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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 130

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

vs.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED JUNE 3, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,944)

(35,944)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1931

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. .....

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

VS.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, RESPONDENT.

United States of America, State of Missouri, ss.

Be it remembered that, heretofore, to-wit, on the 3rd day of February, 1931, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, in a cause entitled State of Missouri, at the relation of Denver and Rio Grande Western Railroad Company, and Atchison, Topeka and Santa Fe Railway Company, relators against Ben Terte, judge of the Circuit Court of Jackson County, Missouri, at Kansas City, No. 31032, a petition for a writ of prohibition, which said petition is in words and figures following, to-wit:

In the Supreme Court of the State of Missouri. October Term, 1930. *January Call,* 1931. *Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, vs. Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Defendant. No.* 31032.

Notice of Filing Petition for Writ of Prohibition and Suggestion in Support Thereof.

To Hon. Ben Terte, Defendant, and Mosman, Rogers and Buzard and Lesley P. Robinson, Attorneys for Ray Curtis:

You are hereby notified that plaintiffs, Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, filed with the clerk of the Supreme Court of the State of Missouri, on Tuesday, February 3, 1931, a petition for a writ of prohibition and suggestions in support thereof, copies of which are attached to a copy of this notice which is herewith delivered to you, and that the court will pass upon this matter at the next meeting of the Supreme Court *en banc,* which will be held on March 2nd, 1931.

HACKNEY & WELCH,
Attorneys for Denver and Rio Grande Western Railroad Company.

CYRUS CRANE,
GEO. J. MERSEREAU,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company.

Service of the above notice and receipt of copies of the petition for a writ of prohibition and suggestions in support thereof therein mentioned are hereby acknowledged this 4th day of February, 1931.

MOSMAN, ROGERS & BUZARD,
By PAUL O. BUZARD,
Attorneys for Ray Curtis.

In the Supreme Court of the State of Missouri. October Term, 1930. *January Call,* 1931. *Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, Plaintiffs vs. Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Defendant. No. .....*

Petition for a Writ of Prohibition.

Plaintiffs petition the court for a writ of prohibition and respectfully show that plaintiff, Denver and Rio Grande Western Railroad Company, is a corporation organized and existing under the laws of the State of Delaware, and owns and operates a railroad for the transportation of freight and passengers in the States of Colorado, Utah and New Mexico, with its main office and general officers in the City of Denver, State of Colorado; that no part of its railroad runs into, through or traverses any part of the State of Missouri; that it has never been licensed to do business in the State of Missouri, nor has it consented to be sued in the State of Missouri; nor has it ever done

any business in the State of Missouri except interstate business as hereinafter stated.

Plaintiffs further show that the plaintiff, The Atchison, Topeka and Santa Fe Railway Company, is a corporation organized and existing under the laws of the State of Kansas and owns and operates a railroad for the transportation of freight and passengers running from Chicago, Illinois, to San Francisco, California, with its main office and general officers in both the City of Chicago, Illinois, and the City of Topeka, Kansas; that its line of railroad runs into, through and traverses a part of both the States of Missouri and Colorado, including Jackson County in said State of Missouri and the City of Pueblo in the said State of Colorado, and it is authorized to do business therein.

Plaintiff further show that the defendant, Honorable Ben Terte, is the duly elected, qualified and acting judge of the Circuit Court of Jackson County, Missouri, at Kansas City.

Plaintiffs further show that on or about the 21st day of August, 1930, Ray Curtis filed in the Circuit Court of Jackson County, Missouri, at Kansas City, his petition, together with an affidavit in attachment wherein he claimed damages (against the plaintiffs herein jointly) in the sum of seventy-five thousand dollars ($75,000.00) on account of injuries alleged to have been received by him on or about the 26th day of December, 1929, at Pueblo, Colorado.

Said petition and affidavit are in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City. September Term, 1930. *Ray Curtis, Plaintiff vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, and Denver and Rio Grande Western Railroad Company, a corporation, Defendants. No. .....*

PETITION FOR DAMAGES.

Comes now the plaintiff and for his cause of action against the defendants states that the defendant, Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as "Santa Fe," is and was during all of the times herein mentioned a corporation duly organized and existing according to law as a railroad company, and did and does own, maintain, and operate a line and system of steam railroad into and through the various states and particularly Missouri, Kansas, and Colorado, and particularly did and does said defendant own, maintain, and operate a line and system of railroad traversing the State of Missouri, and Jackson County, Missouri, wherein this suit is brought, and it did and does own, maintain, and operate a line and system of railroad in and through the City of Pueblo, Colorado, and into and through an interlocking plant and device of tracks and signals, at or near the City of Pueblo, Colorado.

Plaintiff states that the defendant, Denver and Rio Grande Western Railroad Company, hereinafter referred to as "Rio Grande," is and was during all of the times herein mentioned a corporation duly organized and existing according to law as a railroad company, and did and does operate, own, and maintain a line and system of steam railroad into and through the States of Colorado, Utah, and elsewhere, and did and does own, maintain, and operate a line and system of

railroad in and through the City of Pueblo, Colorado, and into and through an interlocking track and signal plant and device, at or near the City of Pueblo, Colorado; said interlocking track and signal plant and device being owned by the defendant Santa Fe, and operated and maintained by both of said defendants for the use and benefit of each other, under some contract, lease, or agreement which is in the possession of the defendants and not in the possession of or under the control of the plaintiff, by reason of which plaintiff cannot attach hereto a copy thereof, but by the terms of which said interlocking rail and signal device and plant is jointly maintained, operated, used, and controlled by the defendants, and each of them.

Plaintiff states that the defendant, Rio Grande, has and maintains, keeps, uses, and employs property in Jackson County, Missouri, and although it is a nonresident of the State of Missouri, is maintains an office and place of business in Jackson County. Missouri, and keeps, employs, and maintains an agent and representative in Jackson County, Missouri, and is represented in Jackson County, Missouri, by said agent and representative for the purpose of carrying on its usual and ordinary railroad business.

Plaintiff states that the said interlocking and signal plant and device mentioned aforesaid and the tracks and lines of railroad into, through, and adjacent to said interlocking rail and signal plant and device are and were, during all of the times herein mentioned, used by said defendants for the purpose of carrying on interstate commerce and so used in interstate commerce.

Plaintiff states that he is a citizen and resident of the State of Missouri, and that on and prior to the 26th day of December, 1929, he was in the employ of the defendants as a signal maintainer's helper and was working under the orders,

direction, and supervision of the defendants acting through their signal maintainer, vice-principal, and foreman, I. C. Rea, and engaged with the defendants in carrying on interstate commerce; and while working at said interlocking rail and signal plant and device for the defendants on said date, he was, by and through the joint and concurring negligence of the defendants as hereinafter more specifically alleged, seriously, grievously, and permanently injured and crippled, as hereinafter set forth.

Plaintiff states that as a part of the said interlocking rail and signal plant and device, there is and has been constructed and maintained a signal tower, in which said tower are located certain mechanical devices and levers used in the operation and control of said interlocking signals, safety devices, and track switches; that said levers connect with conduits and pipe lines running from said signal tower along the various tracks and to signals, switches, and safety devices; that said pipe lines and conduits, which are moveable and which are moved by the operation of the levers there are kept and maintained, certain devices known as compensators for the purpose of equalizing said conduits and pipe lines and assisting in the operation thereof.

Plaintiff states that on the date aforesaid, he was in said tower and was attempting to move and shift the levers therein under and pursuant to the orders and directions of his said foreman, and that because the pipelines and conduit were negligently and carelessly maintained by the defendants in that they were old, warped, worn out, loose, out of compensation, contracted, or restricted, and other acts of negligence hereinafter set out said lever being operated by the plaintiff as aforesaid was caused to jerk and rebound and violently throw, hurl, and jerk the plaintiff and cause him to be injured.

Plaintiff states that the defendants negligently and carelessly used, maintained, and operated the said interlocking rail and signal plant and device when the same was too antiquated, obsolete, and old, worn out, dilapidated, and defective to safely use the same, and the defendants used and employed a negligent method of doing business in the use and operation of said interlocking rail and signal plant and device in that the said plant and device was operated by manpower which was dangerous and not reasonably safe for the plaintiff and other employees, whereas, it was reasonable, practicable, and feasible to use and operate an electrically operated interlocking rail and signal plant and device, which said electrically operated plants are and were in common, ordinary, and customary usage under the same or similar circumstances, and if the same had been used and employed by the defendants, plaintiff would not have been injured.

Plaintiff states that the defendants negligently and carelessly caused or permited the conduits and pipe lines extending from the levers in said towers to the switches, derails, locks, signals, and devices to become crooked, out of line, insufficient, defective, and worn out which caused, allowed, and permitted the levers operating the same to be dangerous to use and handle in that they were likely to and did rebound and spring back when being used or operated. The defendants negligently and carelessly allowed and permitted the compensators in said lines to be extended too far and be out of compensation which caused or permitted the levers in said signal tower to spring back and rebound when being operated.

The defendants negligently and carelessly failed to warn the plaintiff of the danger of attempting to operate said levers under the circumstances, as herein alleged, when the defendants knew or should have known that to operate or at-

tempt to operate said levers was likely to cause injury to the plaintiff.

The defendants negligently and carelessly ordered, directed, and required plaintiff to operate said levers when they knew or should have known that the defects as aforementioned were likely to and did cause said levers to spring back and rebound and cause injury to the plaintiff.

The defendants negligently and carelessly failed to provide plaintiff with a reasonably safe place in which to work and with reasonably safe tools and appliances with which to work in that the levers, conduits, pipe lines, compensators, or attachments were old, worn out, defective, crooked, warped, twisted, and out of line, and which were likely to and did cause the levers operated by plaintiff to spring back and rebound, thereby injuring him.

Plaintiff states that all of said conditions were known to, or by the exercise of ordinary care could or should have been known to the defendants for such a sufficient length of time prior to the time plaintiff was required to work thereupon that the same could have been altered, changed, repaired, or made reasonably safe, and thereby have prevented the injury to plaintiff.

Plaintiff states that each and every one of said negligent acts and omissions on the part of the defendants as aforesaid jointly and concurrently, directly caused or contributed to cause plaintiff's injuries and condition.

Plaintiff states that his injuries consisted of the following:

A broken neck; the bones, nerves, vessels, muscles, cartilages, ligaments, and attachments of his neck, back, and spine were bruised, twisted, wrenched, sprained, lacerated, contused, broken, and fractured; the muscles of his back were wrenched, sprained, and twisted; he suffered a concussion to his spine, spinal cord, and brain; his

spinal cord and the nerves emanating therefrom were torn, lacerated, bruised, contused, shocked, and paralyzed; his right arm, shoulder, side and leg are partially paralyzed as a result of said injuries and are becoming worse and will become totally paralyzed; and he has lost the partial use of his right arm, leg, and side, and he will in the future lose the partial use of his right arm, leg, and side; and he will in the future lose the total use of said members; he suffered a permanent and lasting shock to his nerves and entire nervous system, and has been rendered permanently nervous; his eyesight and hearing have been weakened and lessened; he has and will lose his natural rest and sleep; he has and will suffer a paralysis of his head, neck, and face, arms, chest, and shoulder. Plaintiff has suffered and will continue to suffer great bodily pain and mental anguish.

Plaintiff states that before he was injured, he was a strong, healthy, able-bodied man; was able to work and earn money and was working and earning the sum of one hundred fifty dollars ($150.00) per month, but that since said time and because of said injuries he has lost and will forever lose said sums of money because of his inability to work and earn money; he has spent the sum of one hundred dollars ($100.00) for medical care and attention, and will in the future be required to spend money for medical care and attention.

Plaintiff states that because of all the foregoing, he has been damaged in the sum of seventy-five thousand dollars ($75,000.00).

Wherefore, plaintiff prays judgment against the defendants and each of them in the sum of seventy-five thousand dollars ($75,000.00), and for his costs.

LESLEY P. ROBINSON,,
MOSMAN, ROGERS & BUZARD,
Attorneys for Plaintiff.

In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1930. Ray Curtis, Plaintiff vs. Atchison, Topeka, and Santa Fe Railway Company, a corporation; and Denver and Rio Grande Western Railroad Company, a corporation, Defendants. No. ....

AFFIDAVIT IN ATTACHMENT.

State of Missouri, County of Jackson, ss.

Clay C. Rogers, of lawful age being first duly sworn upon his oath states that he is agent and attorney for the plaintiff, Ray Curtis, and makes this affidavit in his behalf and states that the plaintiff has a just demand against the defendant, Denver and Rio Grande Western Railroad Company, and that the amount which affiant believes the plaintiff ought to recover from said defendant, after allowing all just credits and set-offs is the sum of seventy-five thousand dollars ($75,000:00), and affiant has good reason to believe and does believe that said Denver and Rio Grande Western Railroad Company, is not a resident of the State of Missouri.

Further affiant saith not.

CLAY C. ROGERS,

Subscribed and sworn to before me this 20th day of August, 1930.

Elaine Lynn,
Notary Public.

My commission expires August 21, 1933.

Plaintiffs further show that upon the filing of said petition and affidavit, a writ of attachment against said Denver and Rio Grande Western Railroad Company and a summons to both defendants was duly issued under the hand and seal of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas

City, directed and delivered to the sheriff of Jackson County, and that thereafter said sheriff made return of said summons and writ. The summons and writ and return thereof being in words and figures as follows, to-wit:

ATTACHMENT WRIT.

In the Circuit Court of Jackson County, Missouri at Kansas City.

The State of Missouri

To the Sheriff of Jackson County, Greeting:

We command you to attach Denver and Rio Grande Western Railroad Company, by all and singular their lands and tenements, goods, chattels, rights, moneys, credit, evidences of debts and effects, or so much thereof as shall be sufficient to satisfy the sum of Seventy-five Thousand and - - - 00/100 Dollars, with interest and costs of suit, in whose possession soever the same may be found in your county, and that you summon the said Atchison, Topeka, and Santa Fe Railway Company, and Denver and Rio Grande Western Railroad Company, to be and appear before our Circuit Court of Jackson County, Missouri, at the Court House in Kansas City, Missouri, on the 2nd Monday in September next, it being the 8th day of said month, then and there to answer the petition of Ray Curtis, wherein judgment is asked for Seventy-five Thousand and 00/100 Dollars, and that you also summon as garnishees all persons in whose hands or possession any personal property, rights, credits, evidences of debts, effects or moneys of the defendant, not actually seized by you, and all debtors of the defendant, and such other persons as the plaintiff or his attorney shall direct, as garnishees, to be and appear before our said court, at the time and place aforesaid, then and there to answer such allegations and interrog-

atories as may be exhibited against them; and have you then and there this writ, certifying thereon how you have executed it.

Witness, Lynn G. Buford, Clerk of said Circuit Court, with the seal thereof hereunto affixed, at office in Kansas City, Missouri, this 21st day of Aug., A. D. 1930.

Lynn G. Buford, Clerk.
(Seal) By L. Hofer, Deputy Clerk.

The returns of service on said writ are as follows:

Executed this writ in Jackson County, Missouri, on the 21 day of August, 1930, by delivering a copy of this writ, together with a copy of the petition as furnished by the Clerk, to E. W. Jette at a business office of the within named defendant corporation Atchison, Topeka and Santa Fe Railway Company. E. W. Jette as Chief Clerk of the said defendant corporation, and person in charge of the said business office. The president or other chief officer of the said defendant corporation could not be found in Jackson County, Missouri, at the time of service.

Jefferson H. Smedley, Sheriff.
By Edw. Cunningham, Deputy.

Executed this writ in Jackson County, Missouri, on the 22 day of August, 1930, by delivering a copy of this writ to H. F. Kleine at a Commercial office of the within named defendant corporation, Denver and Rio Grande Western Railroad Company, H. F. Kleine as General Agent of the said defendant corporation, and person in charge of the said Commercial office. The president or other chief officer of the said defendant corporation could not be found in Jackson County, Missouri, at the time of service.

Jefferson H. Smedley, Sheriff.
By Edw. Cunningham, Deputy.

2 Dfs 2.00

Plaintiffs further state that upon receipt of said writ of attachment, summons in garnishment was issued by and under the hand of the Sheriff of Jackson County, Missouri, as follows:

SUMMONS OF GARNISHEE.

In the Circuit Court of Jackson County, at Kansas City, Missouri. September Term, 1930. *Ray Curtis, Plaintiff vs. Atchison, Topeka and Santa Fe Railway Company, a corp. and Denver Rio Grande Western Railroad Co., a corp., Defendant. No.* 337578.

To Kansas City Terminal Railway Company; Atchison, Topeka & Santa Fe Railway Company; Union Pacific Railroad Company; Missouri Pacific Railroad Company; ..... Garnishee:

I, the undersigned Sheriff of Jackson County, Missouri, do declare to you that I do attach, levy upon and seize in your hands all debts owing by you to above named defendant Atchison, Topeka and Santa Fe Railway Company, a corp. and Denver Rio Grande Western R. R. Co. a corp. together with all personal property, money, rights, credits, bonds, bills, notes, drafts, checks, and other choses in action, and also all other personal property, as well of other kinds as of the kinds aforesaid, including all manner and kinds of property whatsoever liable to garnishment, of the said defendant in your possession or charge or under your control, or now owing by you, and all that may come into your possession, charge or control, or become owing by you, between this time and the time of filing your answer herein.

And I further declare to you that I do attach, levy upon and seize in your hands all debts now due from you to the said defendant and also all that may become due hereafter and before said

time of your answer, or so much thereof as shall be sufficient to satisfy the sum of Seventy-five Thousand and no/1 - - ($75000.00) - - - Dollars, with interests and costs.

And I further declare to you that I do summon you as garnishee aforesaid to be and appear before the Honorable Circuit Court of Jackson County, Missouri, at Kansas City, Missouri, on the first day of the next term thereof, it being the 8th day of September, A. D. 1930, then and there to answer such allegations and interrogatories as may be exhibited by Ray Curtis the above named plaintiff.

Given under my hand at office in Kansas City, Jackson County, Missouri, this 21st day of August, 1930.

Jefferson H. Smedley,
Sheriff of Jackson County, Missouri.

By Anthony Bondon
Deputy Sheriff.

Note: Make Your Answer to This Garnishment to the Circuit Court of Jackson County at Kansas City.

Garnishment Released
8/23 1930
Jefferson H. Smedley, Sheriff.
By MC Deputy
As to A T S. F. Ry Co
only

and that thereafter the Sheriff of Jackson County, Missouri, made return of said garnishment summons in words and figures as follows, to-wit:

SHERIFF'S RETURN.

Executed the within writ in Jackson County, Missouri, on the 21st day of August, 1930, by garnisheeing Atchison, Topeka & Santa Fe Railway Company, the Union Pacific Railroad Company and the Missouri Pacific Railroad Company by declaring to them that I did attach in their hands all debts due by them to the within named defendant together with all personal property, money, rights, credits, bonds, bills, notes, drafts, checks or other choses in action of the within named defendant or so much thereof as will be sufficient to satisfy the sum of Seventy-five Thousand and no/100 ($75,000.00) dollars, with interest and costs of suit; and I did summons them the said Atchison, Topeka & Santa Fe Railway Company, the Union Pacific Railroad Company and the Missouri Pacific Railroad Company to be and appear before the Circuit Court of Jackson County, at Kansas City, Missouri, on the 8th day of September, 1930, then and there to answer such interrogatories as may be exhibited by Ray Curtis the within named plaintiff by delivering to E. W. Jette, Chief Clerk of The Atchison, Topeka & Santa Fe Railway Company, at 12:50 o'clock P. M. to C. F. Swarm, Chief Clerk of the Union Pacific Railroad Company at 1:05 o'clock P. M. and to C. H. Campbell, Chief Clerk of the Missouri Pacific Railroad Company, at 12:30 o'clock P. M. a notice of such garnishment and summons a copy of..... which said notice by me so delivered is hereby attached and made a part of this return.

And further executed this writ in Jackson County, Missouri, on the .... day of ..... 19...., by making diligent search for, but could not find any goods, chattels or real estate of the within

named defendant . . . upon which to levy the same and this writ is returned not further satisfied . . . .

. . . . . .

Jefferson H. Smedley,
Sheriff of Jackson County, Missouri.
By Anthony Bondon, Deputy.

Thereafter and on the 22nd day of August, 1930, the sheriff of Jackson County, Missouri, made a like return of said garnishment summons on the Kansas City Terminal Railway Company.

Plaintiffs further show that on the 9th day of September, 1930, the plaintiff Denver and Rio Grande Western Railroad Company duly filed in said cause in said Circuit Court its separate motion to quash writ of attachment and summons and the service thereof and to dismiss for want of jurisdiction, which said motion was in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri at Kansas City. September Term, 1930. *Ray Curtis, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, a corporation, and Denver & Rio Grande Western Railroad Company, a corporation, Defendants. No.* 337578.

MOTION OF DEFENDANT, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY TO QUASH WRIT OF ATTACHMENT AND SUMMONS AND THE SERVICE THEREOF AND TO DISMISS FOR WANT OF JURISDICTION.

Now comes defendant, Denver & Rio Grande Western Railroad Company, appearing specially for the purpose of this motion only and for no other purpose whatsoever and moves the court to quash the writ of attachment and the summons

therein contained issued herein against this defendant and to quash the service thereof on this defendant and also to dismiss this cause as to this defendant and also as to its co-defendant herein for want of jurisdiction of this court over this defendant and for want of jurisdiction over the subject matter of this particular action and as ground for this motion this defendant shows to the court that this defendant is a railroad corporation duly incorporated under the laws of the State of Colorado, having its principal office and place of business in said state; that this defendant is not and never was incorporated in the State of Missouri, and has never been licensed to transact business in Missouri and has never consented to be sued in said state; that this defendant owns and operates lines of railroad in the States of Colorado, Utah and New Mexico for the transportation of freight and passengers for hire and does not and never did own or operate any railroad in the State of Missouri and is and was at all of the times a non-resident of said State of Missouri.

That the controversy and transaction on which the pretended cause of action set forth in the plaintiff's petition herein purports to be based did not arise or occur within the State of Missouri but arose and occurred wholly and solely within the State of Colorado while the plaintiff was an employee of this defendant and while plaintiff was engaged in the service of this defendant as an assistant signal maintainer or helper at this defendant's interlocking plant or tower in the City of Pueblo in the State of Colorado as appears from the allegations of the plaintiff's petition. That all the facts and circumstances bearing on the plaintiff's pretended cause of action and on the defense thereto likewise arose and occurred in said State of Colorado; that the witnesses to the facts and circumstances involved in this action reside outside of the State of Missouri and with-

out the jurisdiction of this court and each of said witnesses resides either in the State of Colorado, Utah or New Mexico; that the trial of this cause and the proper defense thereof by either or both of the defendants herein would necessarily require the taking away from their customary occupations and duties many of this defendant's empolyees actively engaged in the operation of its lines of railroad and would greatly interfere with and impair the efficient operation of this defendant's lines of railroad and cause this defendant unreasonably heavy expenses and would entail a heavy burden upon and would unreasonably obstruct interstate commerce in which this defendant is actually engaged in said States of Colorado, Utah and New Mexico in the operation of its said lines of railroad.

That the attachment of the property of this defendant under the writ issued herein as said writ was served also unreasonably interferes with, hampers and obstructs and places an additional unreasonable burden upon said interstate commerce so carried on by this defendant.

That at the time the plaintiff claims, in his petition herein, to have been injured he was and had, for many years, been a resident of the State of Colorado, and that plaintiff never was at any time a *bona fide* resident of the State of Missouri.

That H. F. Kleine, upon whom the summons contained in the writ of attachment was served herein, is and was then merely a soliciting agent of this defendant who was only authorized to solicit interstate freight and passenger business that might eventually reach the lines of railroad and be transported by this defendant after leaving the State of Missouri, and that said Kleine had no authority to do any other kind of business and had no authority to and does not receive freight or passengers in the State of Missouri; that said Kleine was not an officer or agent of this de-

fendant on whom the process of summons against this defendant could lawfully or properly be served in this action.

Defendant further states that to permit such pretended service of process upon it as occurred in this cause would constitute an unreasonable interference with and burden upon interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and would be a denial of due process of law to this defendant contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

This defendant further shows that the taking of jurisdiction of this cause by this court and the issuance and service of the writ of attachment herein under the facts and circumstances hereinbefore set out in this motion would constitute an unreasonable burden upon and unreasonably obstruct and interfere with interstate commerce in violation of said Article I, Section 8, Clause 3 of the Constitution of the United States.

Wherefore this defendant limiting its appearance in this cause for that purpose only moves this court to make an order quashing the attachment writ and also the summons therein contained and the pretended service thereof upon this defendant and that this defendant be not required to plead herein but that this action be dismissed for want of jurisdiction of this court thereof.

HACKNEY AND WELCH,

Attorneys for Defendant, Denver & Rio Grande Western Railroad Company.

State of Missouri, County of Jackson, ss.

Thos. Hackney, being first duly sworn on his oath, says that he is one of the attorneys for said

Denver & Rio Grande Western Railroad Company and makes this affidavit on its behalf; that affiant is familiar with the facts set forth in the above and foregoing motion, and says that the facts therein stated are true to the best of his knowledge, information and belief.

THOS. HACKNEY.

Subscribed and sworn to before me this 9th day of September, 1930.

Mary Bogle,
Notary Public.

My commission expires June 6, 1933.

Thereafter and in support of said motion it filed with said Circuit Court the affidavit of J. B. Pyeatt which said affidavit was in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City. September Term, 1930. *Ray Curtis, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, and The Denver and Rio Grande Western Railroad Company, a corporation, Defendants. No.* 337578.

Affidavit of J. S. Pyeatt

State of Colorado, City and County of Denver, ss.

J. S. Pyeatt, of lawful age, being first duly sworn, upon his oath deposes and says:

That he is and since December 20, 1924, has been President of The Denver and Rio Grande Western Railroad Company, one of the defendants in the above entitled cause; That The Denver and Rio Grande Western Railroad Company is a railroad corporation organized and existing under and by virtue of the laws of the State of

Delaware; that said Railroad Company owns and operates and at all times mentioned herein owned and operated a certain line of railroad lying wholly within the States of Colorado, Utah and New Mexico and is engaged in the transaction of a common carrier business in interstate commerce within said States of Colorado, Utah and New Mexico; that said The Denver and Rio Grande Western Railroad Company does not now own, lease, control or operate and never has at any time owned, leased, controlled or operated any line or lines of railroad within the State of Missouri; that said Railroad Company has not done nor has said Railroad Company at any time done business within the State of Missouri except to maintain an agent for the solicitation of traffic.

Affiant states that on December 26, 1929 and for two and a half years prior to said date Ray Curtis, the above named plaintiff, was in the employment of said defendant as assistant signal maintainer and was engaged in his duties of keeping in repair the signal apparatus and interlocking plant at the intersection of the tracks of The Atchison, Topeka and Santa Fe Railway Company and The Denver and Rio Grande Western Railroad Company in the City of Pueblo, Colorado; that this action was brought to recover for certain alleged injuries sustained by the said Ray Curtis while repairing said interlocking plant at Pueblo, Colorado on said December 26, 1929; that on said date and at all times since April or May, 1927, the said Curtis was a resident and citizen of Pueblo, Colorado; that after said date Ray Curtis continued to reside in Pueblo, Colorado until some time in July or August, 1930; that from the summer of 1928 until June 2, 1930 said plaintiff resided with his family in a house located at 1210 East Fifth Street, Pueblo, Colorado; that on June 2, 1930 he vacated said house but remained in Pueblo as a resident thereof

until August 20, 1930 when he shipped certain of his household effects to Trenton, Missouri.

In order to properly present defendant's defense at the trial of this cause it will be necessary to have present as witnesses numerous employes of The Denver and Rio Grande Western Railroad Company who are regularly engaged in work connected with defendant's line of railroad in the State of Colorado, including assistant general manager, the chief signal maintainer, signal foreman and tower operator, all of whom will be necessary witnesses in the trial of said cause; that said employes are daily engaged in a technical branch of railroad operation which is necessary to the operation of defendant's interstate trains and the trial of this action in the State of Missouri will entail a heavy burden and unreasonably obstruct interstate commerce; that said witnesses will be compelled to leave their employment in the hands of other employes who have not the same experience in the performance of duties connected with said employment and would require the absence of said employes from their duties for an indefinite period of time and at great expense to said defendant Railroad Company and thereby entail a heavy burden upon interstate commerce.

Affiant states that on December 16, 1928 said Ray Curtis while engaged in repairing or testing the apparatus in said interlocking plant at Pueblo sustained certain alleged injuries to his neck, similar in character to those set forth in his complant herein; that as a result of said injuries said plaintiff was confined in the hospital of The Denver and Rio Grande Western Railroad Company at Salida, Colorado, and was given treatment by the physicians and surgeons of the defendant in Colorado; that as a result of plaintiff's alleged injuries complained of in his complaint herein set

out plaintiff was again confined in said hospital at Salida, Colorado and was treated by said surgeons and physicians of said Railroad Company in Colorado; that in order to properly present defendant's defense in this action it will be necessary and imperative in the opinion of affiant for defendant to produce and have present at the trial of said cause in Missouri said physicians and surgeons and certain hospital attendants, thereby entailing the absence of defendant's employes from their customary occupations and impair efficiency in operation and causing heavy expense to said defendant; that both defendants in this action are engaged in business in the State of Colorado and are subject to suit in said State of Colorado where the alleged cause of action arose and where the plaintiff resided at the time said cause of action accrued.

And further affiant saith not.

J. S. Pyeatt.

Subscribed and sworn to before me this 13th day of September, 1930.

My commission expires February 25, 1932.

(L. S.) Jesse E. Buell,
Notary Public..

Plaintiffs further show that on the 30th day of December, 1930, plaintiff, The Atchison, Topeka and Santa Fe Railway Company duly filed in said cause in said Circuit Court its separate amended and supplemental motion to quash attempted service of process and return thereof and to dismiss the cause, which said motion was in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, At Kansas City. September Term, 1930. *Ray Curtis, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, and Denver and Rio Grande Western Railroad Company, a corporation, Defendants. No.* 337578.

AMENDED AND SUPPLEMENTAL MOTION TO QUASH ATTEMPTED SERVICE OF PROCESS AND RETURN THEREOF AND TO DISMISS THIS CAUSE.

Now on this day comes defendant, The Atchison, Topeka and Santa Fe Railway Company, appearing specially for the purpose of making this motion only and for no other purpose whatsoever, and limiting its appearance for that purpose, moves that the service of summons therein upon this defendant be quashed and the suit dismissed and as grounds for this motion, this defendant respectfully shows to the court that this defendant is a railroad corporation duly incorporated under the laws of the State of Kansas, but is authorized to do business both in the State of Missouri and in the State of Colorado, and is engaged in carrying on in each of said states its interstate business.

That at the time the plaintiff claims in his petition herein to have been injured, he was and had been for many years, a resident of the State of Colorado, and that plaintiff never was at any time (as this defendant is informed and believes) a *bona fide* resident of the State of Missouri.

That the controversy and the facts on which the pretended cause of action set forth in plaintiff's petition filed in this cause and upon which said pretended cause of action purports to be based, did not arise or occur within the State of Missouri, but said purported cause of action, if any the plaintiff has, which this defendant

denies, arose and occurred wholly and solely within the State of Colorado while the plaintiff was an employe of The Denver and Rio Grande Western Railroad Company, this defendant's co-defendant herein, and while said plaintiff was engaged in the service of said Denver and Rio Grande Western Railroad Company as assistant signal maintainer at the interlocking plant or tower of said Denver and Rio Grande Western Railroad Company, in the City of Pueblo in the State of Colorado, as said petition of plaintiff discloses on its face.

That said Denver and Rio Grande Western Railroad Company is a non-resident of this state and is not licensed to do business in this state and does not own or operate any railroad within this state, but is a resident of and doing business in said State of Colorado; that all of the facts and circumstances bearing on the plaintiff's said pretended cause of action and all of the facts and circumstances constituting the defense thereto, either in behalf of said Denver and Rio Grande Western Railroad Company and/or The Atchison, Topeka and Santa Fe Railway Company likewise occurred in the State of Colorado.

That the witnesses to the facts and circumstances involved in plaintiff's alleged cause of action, either as against the defendant, Denver and Rio Grande Western Railroad Company and/or The Atchison, Topeka and Santa Fe Railway Company, reside outside of the State of Missouri and without the jurisdiction of this court, and each and all of the said witnesses reside either in the State of Colorado, Utah or New Mexico and are all employes of said Denver and Rio Grande Western Railroad Company, and are not under or subject to the control of this defendant, The Atchison, Topeka and Santa Fe Railway Company, and whose personal attendance at the trial of this cause in this court cannot be enforced by the defendant,

The Atchison, Topeka and Santa Fe Railway Company, by legal process or otherwise.

That in order to properly present this defendant's defense at the trial of this cause it will be necessary to have present as witnesses numerous employes of said Denver and Rio Grande Western Railroad Company who are regularly engaged in work connected with said Denver and Rio Grande Western Railroad Company in the State of Colorado, including its assistant general manager, its chief signal maintainer, its signal foreman and tower operator, the personal attendance of whom will be necessary as witnesses in the trial of this cause and in the defense thereof in behalf of the defendant, The Atchison, Topeka and Santa Fe Railway Company; that said employes are daily engaged in a technical branch of railroad operation which is necessary to the operation of said Denver and Rio Grande Western Railroad Company's interstate trains, and to enforce, compel or require (if possible) the attendance of said witnesses at the trial of this cause of action in this court would entail a heavy burden and unreasonably obstruct and interfere with the interstate commerce of both the said Denver and Rio Grande Western Railroad Company and said The Atchison, Topeka and Santa Fe Railway Company.

That if it were possible for this defendant to compel the attendance of said Denver and Rio Grande Western Railroad Company's employes as witnesses at the trial of this cause in this court (which this defendant says cannot be done); still, to compel such attendance would mean that said witnesses would be compelled to leave their duties in the hands of other employes who have not had the same experience in the performance of the duties connected with their several employments and would require the absence of said employes from their duties for an indefinite period of time and at great expense, not only to the defendant, The Atchison, Topeka and Santa Fe Railway Com-

pany but also at great expense to said Denver and Rio Grande Western Railroad Company, and would thereby necessarily entail a heavy burden upon the interstate commerce of both said Denver and Rio Grande Western Railroad Company and said The Atchison, Topeka and Santa Fe Railway Company, and would greatly interfere with and impair the efficient operation of the lines of railroad of said Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, and would entail upon defendant, The Atchison, Topeka and Santa Fe Railway Company unreasonable expense and would entail a heavy burden upon it and would unreasonably obstruct the interstate commerce in which this defendant is actively engaged in the operation of its railroad as well as that of the defendant, Denver and Rio Grande Western Railroad Company.

This defendant further shows that the taking of jurisdiction of this cause by this court under the facts and circumstances hereinbefore set forth in this motion would constitute an unreasonable burden upon, and unreasonably obstruct and interfere with interstate commerce in violation of Article I, Section 8, Subdivision 3 of the Constitution of the United States.

Wherefore, this defendant, limiting its appearance in this cause for that purpose only, moves this court to make an order quashing the return of the sheriff on the summons issued herein, and that this defendant be not required to plead in this cause, and that this suit be dismissed as to this defendant.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

By CYRUS CRANE,
GEO. J. MERSEREAU,
JOHN H. LATHROP,
WINSTON H. WOODSON,
By GEO. J. MERSEREAU,
Its Attorneys.

State of Missouri, County of Jackson, ss.

Geo. J. Mersereau, of lawful age, being first duly sworn, upon his oath states that he is an attorney and an agent of the Atchison, Topeka and Santa Fe Railway Company, the maker of the above and foregoing motion, and knows the matters therein stated and set forth are true.

GEO. J. MERSEREAU.

Subscribed and sworn to before me this 30th day of October, 1930.

Lynn G. Buford, Clerk.
By E. G. Bush, Deputy.

Plaintiffs further show that in support of its separate motion the plaintiff, The Atchison, Topeka and Santa Fe Railway Company in due time filed the affidavit of said J. S. Pyeatt, copy of which appears, *supra.*

Plaintiffs further show that on the 30th day of December, 1930, said motions to quash the attempted service of process were argued, briefed and submitted, and at which hearing the plaintiff Ray Curtis offered in opposition to said motions the deposition of H. F. Kleine, he being the soliciting agent for the Denver and Rio Grande Western Railroad Company at Kansas City, Missouri, a copy of which deposition is filed herewith and marked "Exhibit A." The plaintiff Curtis also, at said hearing offered the following affidavits, which are in words and figures as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City. September Term, 1930. *Ray Curtis, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, and Denver and Rio Grande Western Railroad Company, a corporation, Defendants. No.* 337578.

AFFIDAVIT AND ANSWER TO MOTION TO QUASH SERVICE OF PROCESS AND TO DISMISS.

State of Missouri, County of Jackson, ss.

O. C. Mosman, of lawful age being duly sworn upon his oath states that he is one of the attorneys for the plaintiff in the above entitled cause, and admits that the defendant, Atchison, Topeka and Santa Fe Railway Company, is a corporation duly organized and existing according to the laws of the State of Kansas; that he admits all of the allegations pleaded in plaintiff's petition herein, but specifically denies that to permit the prosecution of this action within the courts of Missouri, would constitute any interference or burden upon interstate commerce, or deprive said defendant of any of its rights.

Affiant states that he denies that all of the witnesses are residents of the State of Colorado, but states that the witnesses reside in Missouri and Colorado, and that the plaintiff is a resident of the State of Missouri.

Affiant further states that the defendant, Atchison, Topeka, and Santa Fe Railway Company, has and has had during all of the times in question a line system of railroad extending into, through, and across the State of Missouri, and it did and does operate its trains, engines, cars, and tracks, and does a general railroad business as a common carrier within the State of Missouri.

Further affiant saith not.

O. C. MOSMAN.

Subscribed and sworn to before me this 11th day of September, 1930.

Elaine Lynn,
(Seal) Notary Public.

My commission expires August 21, 1933.

In the Circuit Court of Jackson County, Missouri, at Kansas City. November Term, 1930. *Ray Curtis, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, a corporation, and Denver and Rio Grande Western Railroad Company, a corporation, Defendants. No.* 337578.

State of Missouri, County of Jackson, ss.

Lesley P. Robinson, of lawful age being first duly sworn upon his oath states:

I am attorney for Ray Curtis, plaintiff in this case, and make this affidavit in his behalf; plaintiff, Ray Curtis, is and has been during his entire lifetime an actual and *bona fide* resident of the State of Missouri, except for a period of temporary absence while working for the defendants in the State of Colorado; that plaintiff now resides in Trenton, Grundy County, Missouri, in which said county he was born and raised and where his family and parents do now and have for many years resided; that I have made full investigation of all the facts and circumstances surrounding the injury to the plaintiff for which he has brought this action, and after having made said full and thorough examination, I have found it to be a fact that he has a good cause of action against the Atchison, Topeka and Santa Fe Railway Company and the Denver and Rio Grande Western Railroad Company jointly as set forth in his petition in this cause; the witnesses whose testimony will be necessary to prove plaintiff's cause of action in a trial of this case, reside in the States of Missouri, Colorado, Utah, and elsewhere, and are not

confined to the State of Colorado, the place where plaintiff's cause of action arose; it was upon my advice that plaintiff instituted his cause of action in the State of Missouri, and for the reason that at the time the action was instituted, plaintiff was a *bona fide* resident of this state, and at least six of his necessary witnesses now reside and did then reside in this state, and because it would place an unreasonable and unnecessarily expensive burden upon plaintiff to go to the State of Colorado or Utah, and there institute an action for damages; that the same witnesses necessary to the defense of this action on behalf of the defendant, Atchison, Topeka and Santa Fe Railway Company, are all of the witnesses and the only witnesses who could be used in the defense by the defendant, Denver and Rio Grande Western Railroad Company; the sworn testimony and deposition of Henry Floyd Kleine, has been taken in this cause, wherein said Kleine testified that he is now and has been for several years the general agent of the defendant, Denver and Rio Grande Western Railroad Company in this state and county, and as such agent, it is his duty among other things to trace freight shipments originating on the line of the defendant, Denver and Rio Grande Western Railroad Company, and terminating in the State of Missouri, and to give information to shippers and customers concerning the same, to keep records of all freight shipments coming into this state, and this district of the state, and in general, do all and every act beneficial or needful for the purpose of carrying on said defendant company's railroad business; that there was now and has been for many years maintained by the said defendant an office and place of business in Jackson County, Missouri; that it pays taxes upon its property located here and keeps a part of its records in respect to the shipment of freight into the State of Missouri in said office.

Affiant further states that the plaintiff is wholly and totally disabled from engaging in any

gainful occupation and is unable to make a livelihood and has no means of support except by the aid of his relatives, and that to require him to go to the State of Colorado, and there institute and prosecute an action against these defendants would be burdensome and unjust and would require such an outlay of money as would hamper or prevent plaintiff from obtaining full and complete justice in this cause.

Further affiant saith not.

LESLEY P. ROBINSON.

Subscribed and sworn to before me this 30th day of December, 1930.

Elaine Lynn,

(Seal) Notary Public.

My commission expires Aug. 21, 1933.

Thereafter, on the 31st day of January, 1931, said motions were separately overruled by the said Honorable Ben Terte, presiding in Division No. 9 of the Circuit Court of Jackson County, Missouri, to which division said cause had theretofore been duly assigned and is now pending therein.

Plaintiff, the Denver and Rio Grande Western Railroad Company, further shows to the court that at the time of the institution of said suit of Ray Curtis hereinabove described and set out, it maintained an office at Kansas City, Missouri, which said office was, at said time and at the time of service of the summons, in charge of H. F. Kleine mentioned in said return of summons upon it, as the man upon whom service of said summons was had.

Plaintiffs further show that said H. F. Kleine is a soliciting agent for the plaintiff Denver and Rio

Grande Western Railroad Company under the title of agent and his only business is to solicit freight and passengers for transportation over the lines of the plaintiff, Denver and Rio Grande Western Railroad Company, which lines of railroad, as has hereinbefore been stated are located entirely without the State of Missouri; that said H. F. Kleine had no other business than that of soliciting such freight and passenger business; that he had only the authority, power, duty and employment to secure by solicitation freight and passenger business for the plaintiff Denver and Rio Grande Western Railroad Company for transportation over its lines of railroad in Colorado, Utah and New Mexico, the states through and into which it runs; that the business to be done by the Denver and Rio Grande Western Railroad Company, if any is obtained by the solicitation of the said H. F. Kleine, must all be done, performed and carried out entirely outside of the State of Missouri; that the said H. F. Kleine had no other business than that of soliciting such freight and passenger business; that he had no authority to and did not sell tickets nor did he at any time have authority to receive, nor did he receive, payment for the transportation of freight or of passengers over the liens of the said plaintiff, Denver and Rio Grande Western Railroad Company; that he had no authority to nor did he issue bills of lading covering any shipments of freight from the State of Missouri to be received and carried over the lines of the said plaintiff, Denver and Rio Grande Western Railroad Company, after it left the State of Missouri; that he

had no authority to nor did he pay out any money for the said plaintiff, Denver and Rio Grande Western Railroad Company; that he had no authority to make contracts and he did not make contracts for the said plaintiff, Denver and Rio Grande Western Railroad Company, and, as stated above, his sole and only business was that of soliciting freight and passenger for transportation over plaintiff, Denver and Rio Grande Western Railroad Company's lines of railroad before mentioned after it left the State of Missouri and no business of *any other* kind was at any time transacted in plaintiff, the Denver and Rio Grande Western Railroad Company's office in Kansas City, Missouri, nor elsewhere in said state.

Plaintiffs further show that the alleged accident to the said Ray Curtis occurred at Pueblo, Colorado, on or about the 26th day of December, 1929, if any such accident did occur, while he was employed by and working for the plaintiff, the Denver and Rio Grande Western Railroad Company as an assistant in maintaining for operation signal towers built, owned and operated by plaintiff, the Denver and Rio Grande Western Railroad Company, and that while assisting other employes of said company in the making of a repair to some part of the machinery connected with a signal tower plant at Pueblo, Colorado, by reason of some alleged defect therein, he claims to have been injured; that at the time of said alleged injury said signal tower was not then being operated to signal any train over the crossing of the railroads of the plaintiffs herein.

Plaintiffs further show to the court that all the witness who could testify for either the plaintiff or the defendants in said suit of Ray Curtis, resided and, as plaintiffs are informed and believe, still reside in the State of Colorado, and if the said suit in the Circuit Court in the City of Kansas City brought by said Ray Curtis be permitted to proceed to trial the expense of transporting said witnesses to Kansas City, Missouri, and returning them to the State of Colorado would be an unnecessary, unreasonable and unlawful burden upon the plaintiffs herein and upon the interstate commerce in which the plaintiffs are engaged; that all of such witnesses are employed by the plaintiff, Denver and Rio Grande Western Railroad Company, in the operation of its trains, and if they should be required to come to Kansas City, Missouri, to attend the trial, other persons would have to be substituted in their places in the performance of their regular duties which substitution would entail an additional expense and would be an additional burden to the interstate commerce in which the plaintiffs are engaged.

Plaintiff, Denver and Rio Grande Western Railroad Company, further shows that it has at no time entered its appearance in the suit of Ray Curtis, pending in the Circuit Court of Jackson County, Missouri, and that it has not been summoned to appear in said cause except as hereinabove set out.

Plaintiffs further show that said services of summonses is wholly insufficient to require plaintiffs' appearances in said cause in said Circuit Court at Kansas City, Missouri, because,

First, it fails to show that the person on whom service of summons was had, with respect to the plaintiff, Denver and Rio Grande Western Railroad Company, was such an agent or that said plaintiff was doing business in the State of Missouri, as, under Section 1186 of the Revised Statutes of Missouri, 1919, or any other applicable statutes of the State of Missouri, could be served and give the Circuit Court jurisdiction over the said plaintiff, Denver and Rio Grande Western Railroad Company, and

Second, that if Section 1186, Revised Statutes of Missouri, 1919, and such other applicable statutes, be construed as permitting a valid service of summons upon the Denver and Rio Grande Western Railroad Company, by serving the said H. F. Kleine, upon and under the facts disclosed in said return, and upon the facts disclosed by the affidavit and in this petition stated, then to that extent said section is void under that part of Section 8 of Article I of the Constitution of the United States, known as the "Commerce Clause," and which gives to the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes; and is also void because in conflict with that part of Section 1, of Article XIV of the Amendments to the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, now deny to any

person within its jurisdiction the equal protection of the laws."

Plaintiff, The Atchison, Topeka and Santa Fe Railway Company, shows that it has at no time entered its appearance in the said suit of Ray Curtis, pending in the Circuit Court of Jackson County, Missouri, and that it has not been summoned to appear in said cause except as hereinbefore set out.

Plaintiff, The Atchison, Topeka and Santa Fe Railway Company, further shows that the said Ray Curtis was not employed by it and that at the time of said alleged accident the plaintiff, The Atchison, Topeka and Santa Fe Railway Company, was not using said signal tower nor was it at the time being operated in connection with any train of the plaintiff, The Atchison, Topeka and Santa Fe Railway Company; that the only connection, if any, plaintiff, The Atchison, Topeka and Santa Fe Railway Company, has with said accident, if at all, is by reason of some joint operating agreement wherein and whereby the plaintiff, The Atchison, Topeka and Santa Fe Railway Company, is permitted to use a certain interlocking plant maintained by plaintiff, the Denver and Rio Grande Western Railroad Company, at Pueblo Junction, Colorado, in the operation of its trains and the carrying on of its interstate business at this junction point; that in said City of Pueblo, plaintiff, The Atchison, Topeka and Santa Fe Railway Company, maintains an office and can be served with legal process.

Plaintiff, The Atchison, Topeka and Santa Fe Railway Company, shows and reasserts the facts as stated in its motion to quash and in its objections to the jurisdiction of the Circuit Court to try and determine the cause of said Ray Curtis in said Circuit Court; that all the witnesses who could testify for either plaintiff or for defendants in said suit resided

in, and, as plaintiff, The Atchison, Topeka and Santa Fe Railway Company, firmly believes, still reside in the State of Colorado, with the possible exception of the plaintiff himself; that none of said witnesses are employed by said plaintiff, The Atchison, Topeka and Santa Fe Railway Company, but are all employees of the plaintiff, Denver and Rio Grande Western Railroad Company, and are not under nor subject to the control of this plaintiff, The Atchison, Topeka and Santa Fe Railway Company, and whose personal attendance at the trial of this cause in the Circuit Court at Kansas City, Missouri, cannot be enforced by the plaintiff, The Atchison, Topeka and Santa Fe Railway Company, by regular legal process; that in order to properly present the plaintiffs' defense in the Circuit Court it will be necessary to have present as witnesses numerous employes of the said plaintiff, Denver and Rio Grande Western Railroad Company, who are regularly engaged in work connected with the said Denver and Rio Grande Western Railroad Company in the State of Colorado, as more particularly set out and stated in this plaintiff's verified motion hereinbefore set out.

This plaintiff, The Atchison, Topeka and Santa Fe Railway Company, further shows that if said suit in the Circuit Court of Jackson County, Missouri, at Kansas City, be permitted to proceed to trial, the expense of transporting said witnesses to Kansas City, Missouri, and returning them to the State of Colorado, would be an unnecessary, unlawful and unreasonable burden upon this plaintiff and upon the interstate commerce in which it is engaged; that if it were possible for this plaintiff to compel or obtain the attendance of the witnesses necessary for its defense in said cause in said Circuit Court, it would also be necessary for it to stand the burden of the additional expense

that would be required of employing other persons to be substituted in their place in the performance of their regular duties, which said substitution would entail an additional expense and would be an additional burden to the interstate commerce in which this plaintiff, The Atchison, Topeka and Santa Fe Railway Company, is engaged.

Plaintiff, The Atchison, Topeka and Santa Fe Railway Company, further shows that to permit this cause to be maintained and prosecuted in the Circuit Court of Jackson County, at Kansas City, Missouri, by reason of the facts and circumstances hereinbefore shown, would be placing such an unreasonable burden on this plaintiff as to render the jurisdiction of the court void under that part of Section 8 of the Constitution of the United States known as the "Commerce Clause" and which gives to the Congress of the United States the power to regulate commerce with the foreign nations and among the several states and with the Indian tribes and which would also be in contravention with that part of Section 1 of Article XIV of the Amendments to the Constitution of the United States which provides that:

> "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiffs further show that said cause of Ray Curtis against The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Denver and Rio Grande Western Railroad Company, a corporation, numbered 337578, is now pending in the Circuit Court of Jackson County, Missouri, Division Number 9, be-

fore the Honorable Ben Terte, judge, and that said court is claiming to have authority to proceed to hear and determine said cause and that the said plaintiff in said cause is claiming that said court has authority to proceed under the rules of said court to a consideration of said cause, and said judge of said court will proceed with said cause and a determination thereof unless restrained by the orders of this court.

Plaintiffs further show that upon the facts hereinabove stated said Circuit Court has no jurisdiction over the person of the plaintiff, the Denver and Rio Grande Western Railroad, in said cause by reason of the lack of service of process therein as more specifically pointed out hereinabove and that to permit said Circuit Court to maintain jurisdiction of said cause against either one or both of the plaintiffs would be an unreasonable burden upon the interstate commerce of the plaintiffs.

The plaintiffs, therefore, pray that a preliminary order or orders be entered by this court and served upon the defendant requiring him to show cause to this court upon a specified day why final judgment in prohibition should not be entered and also commanding the defendant to meanwhile refrain from all action in the premises until the further order of this court, and for such other orders as to this court may seem proper.

The Denver and Rio Grande Western Railroad Company,
HACKNEY & WELCH,
By THOS. HACKNEY,
Its Attorneys.

The Atchison, Topeka and Santa Fe Railway Company,
By CYRUS CRANE,
GEO. J. MERSEREAU,
Its Attorneys.

State of Missouri, County of Jackson, ss.

Thomas Hackney, of lawful age, being first duly sworn, on his oath states that he is an agent and an attorney for the plaintiff, Denver and Rio Grande Western Railroad Company; that he assisted in the preparation and has read and is familiar with the foregoing petition for a writ of prohibition and that the facts therein stated are true.

THOS. HACKNEY.

Subscribed and sworn to before me this 2nd day of February, 1931. My commission expires June 6, 1933.

(Seal) Mary Bogle,
Notary Public within and for
Jackson County, Missouri.

State of Missouri, County of Jackson, ss.

Geo. J. Mersereau, of lawful age, being first duly sworn, on his oath states that he is an agent and an attorney for the plaintiff, The Atchison, Topeka and Santa Fe Railway Company; that he assisted in the preparation and has read and is familiar with the foregoing petition for a writ of prohibition and that the facts therein stated are true.

(Signed) GEO. J. MERSEREAU.

Subscribed and sworn to before me this 2d day of February, 1931. My commission expires May 8th, 1932.

(Seal) (Signed) Lottie M. Vogel,
Notary Public within and for
Jackson County, Missouri.

No. 31032.

IN THE

SUPREME COURT OF MISSOURI

OCTOBER TERM, 1930.

JANUARY CALL, 1931.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFFS,

VS.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, DEFENDANT.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION.

A writ of prohibition is applied for by the Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") and by the Atchison, Topeka and Santa Fe Railway Company (hereinafter called "Santa Fe") to restrain Judge Terte from entertaining jurisdiction in an action brought by Ray Curtis against the said railroad companies jointly, now pending in his court.

Ray Curtis was, and had been for over two years, an assistant signal maintainer in the employ of the

Rio Grande and was injured on December 26, 1929, while he and other employees of the Rio Grande were repairing an interlocking plant at Pueblo, Colorado, where the lines of the two companies cross. He was not a signal *operator* and was not directing the movement of any train at the time of his alleged injury.

Curtis had been and was living in Pueblo, Colorado, for two and one-half years prior to and at the time of his alleged injury, and where he still resided until July or August, 1930, when he moved to Trenton, Missouri.

On August 21, 1930, Curtis brought suit for $75,000 damages against the said railroad companies in the Circuit Court of Jackson County, Missouri, the action against the Rio Grande being by attachment, and under the writ of attachment sundry railroad companies were garnished. No attachment was issued against the other defendant.

The Rio Grande is a Delaware corporation with its principal office or place of business in Denver, Colorado. Its lines of railroad are solely within the States of Colorado, New Mexico and Utah, and no part of its line runs through Missouri. It has not consented to be sued in Missouri and has never been admitted to do business in this state. It has never done any business in this state except soliciting freight and passenger business for transporation in interstate commerce over its lines in the other states. For this limited purpose it maintains offices in St. Louis and Kansas City. The process of summons contained in the attachment

writ was served upon its soliciting agent, H. F. Kleine, at Kansas City, Missouri.

The separate motion of the Rio Grande filed in and overruled by the Circuit Court challenged the sufficiency of the service on Kleine and also challenged the validity of the attachment writ and the jurisdiction of the Circuit Court to entertain the action by Curtis. The motion asked that the writ and the service thereof be quashed and that the action be dismissed for want of jurisdiction. As to the Rio Grande, the facts and circumstances as to the situation of the parties, the place of accident and the objection against the bringing of the suit in Missouri are practically the same as in the case of *Michigan Central Railroad Co.* v. *Mix,* 278 U. S. 492, where, on certiorari, the ruling of the Missouri Supreme Court denying the writ of prohibition was reversed. In that case, however, there was no attempted service by attachment, but by the decision of the Supreme Court of the United States in the case of *The Atchison, Topeka and Santa Fe Railway Co.* v. *Wells,* 265 U. S. 101, it was held that an attachment under similar circumstances was void. The court says (l. c. 103):

> The Santa Fe is a Kansas corporation. It had not been admitted to Texas as a foreign corporation. It had not consented to be sued there. It did not own or operate any line of railroad within the state; and had no agent there. The Texas statutes concerning garnishment were construed and applied in the Wells suit so as to permit a citizen and resident of another state to prosecute in Texas a cause of action which arose elsewhere against a railroad corporation of

another state, which is engaged in interstate commerce, which neither owns nor operates a railroad in Texas, and which has not consented to be sued there. For the reasons stated in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312 (decided since the entry of judgment here under review) such a suit necessarily and unreasonably burdens interstate commerce; and the statute as construed and applied is invalid.

So that, for all practical purposes, no other authorities than the *Mix* and *Wells* cases, and cases therein cited need be referred to.

The same showing is made in the instant case as in the *Mix* case with respect to the maintenance of the suit in Missouri being a burden on interstate commerce.

The obvious burden in the instant case is greater than in the *Mix* case. It will be seen from the affidavit of J. S. Pyeatt, President of the Rio Grande, that on December 16, 1928, Ray Curtis while in the employ of said company, sustained alleged injuries to his neck similar in character to those set forth in his petition in the instant case; that as a result of that prior injury he was confined in the said company's hospital at Salida, Colorado, where he was given treatment by physicians and surgeons of the company; that as a result of his alleged injuries complained of in his present suit he was again confined in the same hospital and received similar treatment; that it would be necessary for the proper defense of the case to bring and have present at the trial divers and sundry witnesses, physicians and nurses who treated Curtis on each of these two occasions, thus

taking the doctors and nurses away from the hospital; that it would also be necessary to have present numerous employees of said railroad company who are regularly engaged in work connected with said defendant's line of railroad in the State of Colorado, including its assistant general manager, chief signal maintainer, signal foreman and tower operator, all of whom will be necessary witnesses in the trial of said cause; that said employees are regularly engaged in a technical branch of railroad operation necessary to the operation of the interstate trains of said Rio Grande, and that said witnesses would be compelled to leave their work in the hands of other employees who have not had the same experience as said employees, and would require the absence of said employees for an indefinite period of time and would thus entail a heavy burden on interstate commerce.

We submit to Your Honors that upon the question of the validity of the service in this case and the jurisdiction of the Circuit Court to hear and determine this case, it is ruled in the *Mix* and *Wells* cases, decided by the Supreme Court of the United States, and in other federal decisions to which we shall refer, that service of process as in this case is illegal and void and the jurisdiction of the state court cannot be sustained: *First,* because the Rio Grande is not doing business in this state in the sense that process can be served upon it under Section 1186, R. S. Mo., 1919, or any other statute of this state; and, *Second,* because to sustain such service of process and the jurisdiction of the state court, under the facts and circumstances involved

in this case, would unnecessarily and unreasonably burden interstate commerce.

Taking these questions up in their order:

(1) *The question of doing business and service on a commercial agent,* we call the court's attention to the following cases:

Green v. *Railway Company,* 205 U. S. 530. This case is followed by a long line of decisions in the United States Supreme Court, in the United States Circuit Court of Appeals, and in the District Courts. Green, a resident of Pennsylvania, brought an action in the Federal Court of Pennsylvania, for personal injuries alleged to have occurred in Colorado. Service was made upon a soliciting agent of the defendant employed in Philadelphia to solicit and procure passengers and freight to be transported over the defendant's line of railroad, renting an office for him for that purpose, and for conducting this business several clerks and various traveling freight agents were employed who reported to the agent at his Philadelphia office and acted under his direction. The eastern terminus of the defendant's line was at Chicago, Illinois. It was held that the defendant company was not doing business in Pennsylvania in the sense that liability for service was incurred, because it hired an office and employed an agent for the purpose of soliciting freight and passenger traffic. It was further held that that business shown was nothing more than solicitation and that this was not enough to bring the defendant within

the jurisdiction of the court so that process could be served upon its said agent.

In *Griffin* v. *Railway Co.*, 38 Fed. (2d) 98, the rule announced in the Green case, *supra,* was set forth in an opinion by Judge Reeves, and the defendant's motion to quash the summons and return of service and to dismiss the cause was sustained. This was a case of a foreign railroad corporation which had no line of railway in Missouri and did no business therein except solicitation of freight for interstate commerce through a commercial representative. It was held that such was not doing business within this state, and hence the corporation was not subject to service of process therein in a suit for injuries sustained outside of the state.

(2) *The question of burden on interstate commerce.*

This question is equally applicable to *both the plaintiffs* herein and is of equal force and effect under the federal decisions. The situation presented by the plaintiff, Santa Fe, is briefly this:

The Santa Fe is a Kansas corporation. It is true it operates a line of railway through Jackson County, Missouri, and that the service of summons was upon its local agent. Under the showing made on the motion to dismiss, etc., filed by that company and also overruled by the court, that company was not the employer of Ray Curtis nor of the other persons associated with Ray Curtis in repairing the interlocking plant mentioned in his petition.

Curtis, at the time of his injury was not operating the interlocking plant for the purpose of signaling the stopping or forwarding movement of any Santa Fe train nor of any train. The Santa Fe was not, therefore, the "employer" of Curtis as that term is used in the Federal Employers' Liability Act. The liability, if any, of the Santa Fe is based solely on a contract between that company and the Rio Grande, by which the Santa Fe is permitted to use certain facilities of the Rio Grande in the operation of its trains in carrying on interstate business by the former. There is no pretense that, at the time of Curtis' injury, any Santa Fe officer, agent or servant was present, assisting in or directing the work with Curtis and his associates in repairing the interlocking plant.

The motion and affidavit filed in support thereof by the Rio Grande stated plainly that Curtis was the employee of that company. The Santa Fe's motion denied that Curtis was in its employ and asserted his employment by the Rio Grande. Curtis, knowing that he had been in the sole service of the Rio Grande, filed no counter affidavit which would tend in any wise to show that the Santa Fe had ever employed him or had the power of discharging or had ever controlled or directed him in any part of his work.

Under this situation as shown by the application filed in this court by the plaintiffs, the Santa Fe would be obligated to depend practically and solely on the employes of the Rio Grande in its defense against the pending action. The Santa Fe has no control over any of these witnesses and could not require the attendance

of any of them. They are all, or substantially all, in the State of Colorado, and the trial of the case against the Santa Fe would, therefore, be the same burden on interstate commerce as it would be if the action were pending against the Rio Grande alone.

In *Michigan Central Railroad Co.* v. *Mix et al.*, 278 U. S. 492, an action was brought in the state courts of Missouri against the Michigan Central Railroad Company to recover damages for the death of a switchman employed by the defendant in Michigan and killed there in the performance of his duties. He was then a resident of Lansing, in that state, and lived there with his wife until his death. Shortly after she removed to Missouri, was appointed administratrix of his estate at St. Louis, and as such, brought in the Circuit Court the action for damages. The defendant railroad was a Michigan corporation. No part of its line runs to, or into, Missouri. It had never consented to be sued and was never admitted to do business there and had never done any business there except soliciting freight for transportation in interstate commerce over its line in other states. For this limited purpose it maintained an office at St. Louis and upon its agent in charge of that office the sheriff made service of summons. The defendant railroad claimed that it was not subject to suit in Missouri, among other reasons because to maintain it would violate the commerce clause. The Supreme Court of the United States held that the mere fact that plaintiff had acquired a residence in Missouri before commencing the action did not make reasonable the imposition upon interstate commerce of

the heavy burden which would be entailed in trying the cause in a state remote from that in which the accident occurred. The order of the state court overruling the motion to quash was reversed.

In *Davis, Director General of Railroads* v. *Farmers' Co-op. Equity Co.*, 262 U. S. 312, a statute of the State of Minnesota compelling every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state was involved. Jurisdiction was not limited to suits arising out of business transacted within the state. Judgment for plaintiff was affirmed by the State Supreme Court but the case was reversed by the United States Supreme Court. The defendant in that case was a Kansas corporation engaged in interstate transportation and did not own nor operate any railroad in Minnesota but did maintain there an agent for the solicitation of traffic. Suit was brought there by the plaintiff, another Kansas corporation, and service was made pursuant to the said Minnesota statute. Recovery was sought for loss of grain shipped under a bill of lading issued by the defendant in Kansas for interstate transportation, in no way, so far as appeared, connected with Minnesota or with the soliciting agency located there. Defendant appeared specially claiming that as to it, the statute authorizing service violated the due process and equal protection clauses of the Fourteenth Amendment, as well as the Commerce Clause, and moved to dismiss the suit for want of jurisdiction. The Supreme Court of the United States held that the Minnesota statute, as construed and applied, violates the Commerce Clause of the Constitution.

Mr. Justice Brandies stated:

> That the claims aginst interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; that this impairs efficiency in operation, and causes directly and indirectly, heavy expense to the carriers—these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious.

In *Griffin* v. *Railway Co., supra,* Judge Reeves refers to and quotes from the *Green,* the *Mix,* the *Davis* and the *Wells* cases, *supra.*

The following is a list of cases decided in the Federal Circuit Courts of Appeals and District Courts upon the points involved in this case:

Cancelmo v. *Seaboard Air Line Railway,* 12 Fed. (2d) 166.

Chase Bag Co. v. *Munson Steamship Line,* 295 Fed. 990.

Weinard v. *Railway Company,* 298 Fed. 977.

Davega v. *Lincoln Furniture Mfg. Co.,* 29 Fed. (2d) 164.

Klabzuba v. *Southern Pacific Co.,* 33 Fed. (2d) 359.

Frink Co. v. *Erickson,* 20 Fed. (2d) 707.

Hussey Tie Co. v. *Knickerbocker Ins. Co.,* 20 Fed. (2d) 892.

Compagnie Du Port de Rio De Janiero v. *Mead Morrison Mfg. Co.*, 19 Fed (2d) 163.
Fowble v. *Railway Co.*, 16 Fed. (2d) 504.
Hilton v. *Metal Co.*, 16 Fed. (2d) 821.
Knobel v. *Railway Co.*, 12 Fed. (2d) 169.

It is respectfully submitted, therefore, that under the facts in this case the plaintiff Rio Grande is not doing business in the State of Missouri such as to permit service of process upon it, and further, to compel the plaintiffs to submit to the jurisdiction of the State Court under the facts shown would be an unreasonable burden upon interstate commerce.

Respectfully submitted,

(Signed) HACKNEY & WELCH,
Attorneys for Plaintiff, Denver and Rio Grande Western Railway Company.

(Signed) CYRUS CRANE,
(Signed) GEORGE J. MERSEREAU,
Attorneys for Plaintiff, The Atchison, Topeka and Santa Fe Railway Company.

EXHIBIT "A."

In the Circuit Court of Jackson County, Missouri, at Kansas City. Ray Curtis, Plaintiff, vs. Atchison, Topeka and Santa Fe Railway Company, and Denver and Rio Grande Western Railroad Company, Defendants.

Deposition of witness produced, sworn and examined on the 25th day of August, 1930, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, pursuant to notice to take depositions at the law offices of Mosman, Rogers & Buzard, 536 Lathrop Building, in the City of Kansas City, County of Jackson and State of Missouri, before me,

PAUL R. SPICER,

a Notary Public within and for Jackson County, Missouri, in a certain cause now pending in the Circuit Court of Jackson County, Missouri, at Kansas City, wherein Ray Curtis is plaintiff, and Atchison, Topeka and Santa Fe Railway Company, and Denver and Rio Grande Western Railroad Company are defendants; taken on the part of the plaintiff.

APPEARANCES: For the Plaintiff: Mosman, Rogers & Buzard, Mr. Lesley P. Robinson. For the Defendants: no appearance.

HENRY FLOYD KLEINE, being produced, sworn and examined as a witness on the part of the plaintiff, deposes and says:

Direct Examination by Mr. Rogers.

Q. Please state your name, Mr. Kleine. A. My full name?

Q. Yes. A. Henry Floyd Kleine.

Q. Where do you live? A. You want my street address?

Q. Yes.. A. 5305 Virginia.

Q. Here in Kansas City, Missouri? A. Kansas City, Missouri.

Q. What is your employment? A. General agent for the Denver and Rio Grande Western Railroad Company.

Q. Where is your office? A. 423 Railway Exchange.

Q. How long have you been employed by the Denver and Rio Grande Western Railroad? A. About ten years.

Q. Are you in charge of their office here in Kansas City, Missouri? A. Yes, sir.

Q. How long have you been in charge of their office? A. About five years.

Q. How large an office space do they have here? A. We have three small rooms. I don't know how much it would be.

Q. What are the numbers of those rooms? A. 423—it would probably be one large room subdivided.

Q. You have three private offices, do you? A. No.

Q. Three office rooms? A. We have a private office and we have another general office, and a little storeroom.

Q. Who pays the rent on those offices? A. The Denver and Rio Grande Western Railroad.

Q. How long have they maintained offices there? A. We have been in the Railway Exchange Building for more than ten years to my knowledge; we have been in our present headquarters in the Railway Exchange Building about two years.

Q. How many employees does the Denver and Rio Grande Western Railroad have here in Kansas City? A. Four.

Q. And do they work on salaries? A. Yes.

Q. All of the employees? A. Yes, sir.

Q. Including yourself? A. Yes, sir.

Q. Salaries paid by the Denver and Rio Grande Western Railroad Company? A. Yes, sir.

Q. And your title is what? A. General agent.

Q. Do they have a freight agent here? A. No. All this office is is a solicitation office.

Q. You sell transportation from this office? A. We do not—we solicit transportation. We do not handle money in any way and do not sell tickets.

Q. If someone comes to your office and wants transportation over your line what do you do about selling transportation? A. Turn them over to one of the connecting lines who run into Kansas City.

Q. You see to it that their transportation is arranged through? A. Yes, sir.

Q. You have charge of arranging their transportation? A. I would arrange to have one of the connecting lines sell them a ticket in connection with our line, or handle their freight shipment in connection with our line.

Q. And you handle freight in that same way, don't you? A. The same thing, yes.

Q. And that has been the custom and practice you have established? A. That is the custom and practice of our line with all lines or agencies.

Q. Do you have an occupation license that is issued to you by the city? A. No.

Q. Or any office license that is issued to you by the city? A. No.

Q. Do you pay any city tax here? A. We pay taxes on our office furniture.

Q. State and county and city taxes? A. Yes, sir.

Q. And do the cars, the freight cars of the Denver and Rio Grande Western Railroad Company come into Missouri over the lines of connecting carriers? A. They go all over the United States.

Q. Well, do they come into Missouri? A. Yes, they come into Missouri.

Q. And when a freight shipment is sent from Colorado into Missouri, through one of your connecting carriers do you have anything to do with that? A. No.

Q. Do you ever have cases where some important customer of the road is concerned, for your special attention, in the matter of his freight shipment coming into Missouri? A. I just don't quite undertand you.

Q. Well, does your company ever ask to look after the wants or business of some customer, any customers, who are having freight shipped into Missouri? A. They

ask us to look after the wants of all shippers shipping freight over our line; not any special one.

Q. I mean does your—I guess I haven't made myself clear. Maybe you could give me some concrete example of it; suppose you have got a big shipper out in Colorado that ships produce or fruit, or anything of that sort into Missouri; now have you ever, when that feight is coming in, had anything to do with taking care of him, and looking after his wishes or desires in respect to freight shipments? A. With regard to claims or anything of that sort, I do not handle any claims.

Q. I don't mean freight claims, but I mean taking care of his wishes in any manner? A. We would give him information on his shipments as to arrival and delivery of them or any information as to their whereabouts or anything of that sort, but so far as the actual handling of that shipment, after it left our rails and was out of our jurisdiction, then it is up to the connecting line we turn it over to.

Q. I understand, but do you frequently do that for customers, give them information concerning their shipment, time of arrival and things of that sort? A. Yes, we do that.

Q. That is usual and customary for you to do if they request it? A. If they request it, yes.

Q. How do you get your information in respect to that now? A. We get our information from the records of the delivering carrier, and from our own records in our office, and records showing the passing of freight shipments of various companies.

Q. Do you keep those records here? A. Yes.

Q. Do you have records of freight shipments that come into Missouri? A. In my territory, yes.

Q. You have? A. Yes.

Q. That is, shipped from Colorado into Missouri you have records of them? A. Yes.

Q. In your office here? A. Yes.

Q. They are regularly kept and maintained as a part of your business are they? A. Well, we keep them until—for tracing purposes, and for our own—for our records, a certain length of time, and then after they have served that purpose we throw them away. They are not a permanent record. We simply keep them as a matter of convenience.

Q. You keep them until the transaction is closed? A. Yes.

Q. And do you keep them on all freight shipments that come into your territory in Missouri? A. On all freight shipments that we handle—where we have the junction passing.

Q. Does the Denver and Rio Grande Western Railroad Company maintain any other offices in Missouri? A. Yes.

Q. Where? A. St. Louis.

Q. And do you know who is in charge of that office? A. C. N. Gray.

Q. Do you ever communicate with him in respect to transportation of freight and passengers from Colorado into Missouri? A. Yes, we do communicate with all of our offices occasionally on business, freight and passenger.

Q. By the way, the Denver and Rio Grande Western Railroad Company, its rails, tracks and lines run into Utah, Colorado and Arizona, don't they? A. No, they run into Utah.

Q. Just Utah, Colorado and Utah? A. Yes.

Q. And do you frequently have freight and passengers come from Utah into Missouri as well as Colorado? A. Yes.

Q. What is the kind of freight ordinarily that comes from those two states? A. Produce—fruit, vegetables, and ore, and various commodities produced in those states.

Q. And those are the commodities that come into your territory? A. Yes.

Q. That is just in a general way? A. Yes.

Q. Of course, other commodities might also come? A. Oh yes, we have various commodities.

Q. Now in the transportation of passengers coming into Missouri from Utah and Colorado, and we will take in the case of either a distinguished personage, or some invalid, are you ever called upon to go down to the station and look after them upon their arrival? A. I have been, but that is not a thing that happens often.

Q. It does occur? A. Oh yes, it occurs, yes, sir.

Q. Frequently? A. Not frequently, no.

Q. Well occasionally, I mean? A. Yes.

Q. And you do that of course from instructions—on instructions from other offices of your company? A. Yes, I think that as a matter of fact on request—we would do that in request of a connecting line or

anyone, where we participated in the business in any way, we would extend in fact, any courtesy we could.

Q. And that of course is a part of your railroad business isn't it? A. Yes.

Q. The payment of rent, do you make the payment here? A. They make that direct from Denver.

Q. Do you keep any office literature, advertising matter concerning your company here, do you? A. Yes.

Q. And distribute that to anyone who wants it? A. Yes, sir.

Q. Do you call upon and interview prospective customers? A. Yes.

Q. You do generally anything that would promulgate the business of the company? A. Anything to promote business for the company, yes.

Mr. Rogers: I believe that's all, thank you Mr. Kleine.

.....

Witness.

Subscribed and sworn to before me this ... day of ....., 1930.

.....

Notary Public within and for
Jackson County, Missouri.

My commission expires .....

State of Missouri, County of Jackson, ss:

I, Paul R. Spicer, a notary public within and for the County of Jackson and State of Missouri, do hereby certify that pursuant to the within notice to take

depositions in a certain cause now pending in the Circuit Court of Jackson County, Missouri, at Kansas City, before me came, at the time and place set forth in the caption hereof, witness:

Henry Floyd Kleine,

who was by me first duly sworn, that the witness was examined and his examination taken down in shorthand by me and later transcribed on the typewriter; that the deposition was thereafter by the witness read over, signed and sworn to on the dates hereinbefore shown; that said deposition is now herewith returned.

Witness my hand and notarial seal this .... day of ....., 1930.

.....
Notary Public within and for
Jackson County, Missouri.

My commission expires .....

Notary Fees: .....

Due: Paul R. Spicer,
312 LaSalle Bldg.,
K. C. Mo.

Upon the filing of said petition and suggestions in support, the following was entered of record in said cause on the 3rd day of February, 1931, to-wit:

State ex rel. Denver & Rio Grande Western Ry. Co. et al., Relators, vs. Ben Terte, J., Respondent. No 31032.

Come now the relators, by attorney, and file herein a petition for a writ of prohibition, together with suggestions in support.

And thereafter, and on the 24th day of February, 1931, the following further proceedings were had and entered of record in said cause, to-wit:

State ex rel. Denver & Rio Grande Ry. Co. et al., Relators vs. Ben Terte, J., Respondent. No. 31032.

Comes now the respondent, by attorneys, and files herein suggestions in opposition to petition for writ of prohibition.

Which said suggestions in opposition to said petition are in words and figures following, to-wit:

In the Supreme Court of Missouri. Denver and Rio Grande Western Railroad Company, and Atchison, Topeka and Santa Fe Railway Company, Plaintiffs, vs. Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Defendant. No. 31032.

STATEMENT.

The action here is for an order prohibiting the Circuit Court of Jackson County, Missouri, from proceeding in a case wherein *Ray Curtis, a citizen and resident of the State of Missouri,* brings an action under the Federal Employers Liability Act against the Denver & Rio Grande Western Railroad Company, a railroad corporation organized *under the laws of the State of Delaware, and a citizen and resident of the State of Delaware,* and the Atchison, Topeka and Santa Fe Railway Company, a railroad corporation organized and existing *under the laws of the State of Kansas, and a citizen and resident of that state,* for injuries

occurring through the joint negligence of the defendants while plaintiff was working on a signal tower and device owned by the Santa Fe, and jointly maintained, operated and controlled by both defendants near Pueblo, in the State of Colorado.

The Santa Fe operates a line of railroad into and through the State of Missouri, and into and through Jackson County, Missouri. The Denver & Rio Grande maintains a large office in Jackson County, in charge of its *generel agent,* H. F. Kleine (Kleine's Depo. page 2). It also maintains an office in the City of St. Louis, in charge of its agent, C. M. Gray (Kleine's Depo. page 7). It pays state, county and city taxes on its furniture which it has in Missouri. It keeps a complete set of records in its office in Jackson County, Missouri, showing the passing of freight shipments coming into this territory (Depo. page 6). From the records and other available data, it requires its agent to give information as to the arrival and delivery of shipments or the whereabouts of the shipments to their customers (Depo. pages 5 and 6). When a distinguished person or invalid arrives at the local station, whose passage originated upon the line of the Rio Grande, the agent is occasionally called upon by the company to look after them upon their arrival (Depo. page 8). The duties of general agent, Kleine, included anything that would promulgate and promote business for the company.

Service was obtained upon the Rio Grande, by two methods:

(a) Personal service upon the general agent at the office and place of business of the company in Jackson County, and

(b) By attachment and garnishment of its freight balances in the hands of connecting carriers.

The Rio Grande filed its motion to quash the service of summons and writ of attachment and garnishment, and among other things, alleged in its motion that it was a corporation organized and existing under the laws of the State of Colorado (afterwards amended to "State of Delaware"). It denied that it was doing any railroad business in the State of Missouri, and alleged that each and all of the witnesses necessary to prove all of the facts in relation to plaintiff's alleged cause of action *resided either in the States of Colorado, Utah or New Mexico.* It set up the claim that to permit the service as obtained in the case (which in fact means the prosecution of the cause of action in the courts of Jackson County, Missouri), would impose an unreasonable burden upon and unreasonably interfere with interstate commerce and would constitute a denial of due process of law. To this motion, the plaintiff filed his verified answer (which was inadvertently omitted from the petition filed herein but which by consent of counsel is attached hereto as an appendix) in which specific denials of each allegation of the motion were made (except the allegation in relation to corporate existence, etc.), and alleged that material and important witnesses necessary to the proper prosecution of the case are legal and *bona fide* residents of the State of Missouri, and that other witnesses live in

various other states, to-wit, Utah, New Mexico and elsewhere.

The Santa Fe filed its supplemental motion to quash the service on it based on grounds similar to that urged by the Rio Grande. There was likewise a verified answer filed to that motion and affidavits set forth in the petition herein were offered in evidence pro and con. The defendant Judge determined the controverted question in favor of the jurisdiction of the Circuit Court of Jackson County, Missouri.

POINTS AND AUTHORITIES.

The Circuit Court, in holding that it had jurisdiction of the controversy, determined:

(a) That the Santa Fe, having a line of railroad within the county and doing a railroad business here, was properly suable in this county on a cause of action in tort arising in a foreign state.

State v. *Hoffman,* 309 Mo. 625, 274 S. W. 362.

Hoffman v. *State of Missouri,* 274 U. S. 21, 47 Sup. Ct. 485.

State of Missouri v. *Taylor,* 266 U. S. 200, 45 Sup. Ct. 47.

Kane v. *New Jersey,* 242 U. S. 160, 37 Sup. Ct. 30.

International Harvester Co. v. *Kentucky,* 234 U. S. 579, 34 Sup. Ct. 944.

Railroad Co. v. *Harris,* 12 Wall. 65.

Shaw v. *Chicago & A. R. Co.,* 314 Mo. 123, 282 S. W. 416.

Wells v. *Davis,* 303 Mo. 388, 261 S. W. 58.

Bright v. *Wheelock,* 20 S. W. (2) 684, l. c. 699 (Mo. Sup.).

(b) Service upon the general agent of the Rio Grande at the office and place of business of that defendant is sufficient to confer jurisdiction over the person of that defendant.

Sec. 728, R. S. Mo. 1929.

State ex rel Texas Portland Cement Co. v. *Sale,* 232 Mo. 166, 132 S. W. 1119.

Davis v. *Jacksonville Southeast Line,* 126 Mo. 69, 28 S. W. 965.

Denver & Rio Grande v. *Roller,* 100 Fed. 738 (C. C. A.).

Stone v. *Insurance Co.,* 78 Mo. 655, 658.

(c) Valid service of process may be had upon a foreign railroad corporation by service upon an agent in a suit based upon a cause of action originating in a foreign state, except when prosecution of the action would unnecessarily impose an unreasonable burden upon interstate commerce.

Hoffman v. *Missouri, supra.*

St. Louis, Brownville, etc. v. *Taylor, supra.*

Davis v. *Jacksonville Southeast Line, supra.*

Denver & Rio Grande v. *Roller, supra.*

(d) The trial of the case in any state would require taking of some witnesses from other states (Colorado, Utah, New Mexico and Missouri).

(e) The Rio Grande was suable in Delaware. The Santa Fe, in Kansas (states of incorporation). Plaintiff resides in Missouri. Witnesses reside in Colorado, Utah, New Mexico and Missouri.

(f) It would not unnecessarily impose an unreasonable burden upon interstate commerce to require

the Santa Fe to submit to the jurisdiction of Missouri courts, it would not unreasonably burden interstate commerce to require its joint tort feasor to submit in the same case where same witnesses are necessary to a defense by either defendant.

(g) All issues raised by defendants relating to residence of plaintiff and witnesses residing in this state, were controverted, and, the decision of the Circuit Court on that question rules those issues in favor of jurisdiction.

BRIEF AND ARGUMENT.

(a) It is admitted that the Santa Fe has a line of railroad running into and through Jackson County, and across the State of Missouri. It does an intra and interstate commerce business. It has an office and place of business in Missouri, and does a general railroad business within the state. That it is suable in this state is really beyond cavil. The same question as presented here by the Santa Fe, has been ruled time after time against it. The very recent case of *Bright* v. *Wheelock*, 20 S. W. (2d) 684, l. c. 699, by this court; considers the question and refers to the Mix, Wells and Davis cases, relied upon by the petitioners herein. In the Bight case, the defendants filed a plea to the jurisdiction on the ground that all of the parties to the controversy and all of the witnesses were residents of the State of Illinois, and that the cause of action arose in the State of Illinois, and the defendants charged in the plea that the maintenance of the action in Missouri courts, "is, therefore, a burden upon interstate

commerce, and is a violation of the commerce clause of the Federal Constitution."

The defendant's plea was denied in the Circuit Court, and that ruling was affirmed on appeal by this court. So far as we have been able to find, that opinion is the latest expression of this court on that question.

Now, compare that case to the facts we have here: Curtis, a *bona fide* resident of the State of Missouri, brings an action against the Santa Fe, a resident of Kansas, on a cause of action which accrued in Colorado, the witnesses to prove or disprove, which reside in the States of Missouri, Colorado, Utah and New Mexico. Therefore, it becomes apparent that as long as the Bright case announces the law of this state, the Circuit Court cannot be prohibited from proceeding with the action against the Santa Fe. In the opinion in the Bright case, will be found an analysis of the other cases upon which we rely and a clear distinction between the facts of this case and the cases upon which the petitioners rely.

In *State ex rel. Foraker* v. *Hoffman*, 309 Mo. 625, 274 S. W. 362, in respect to the identical claim made here by the Santa Fe, this court in a very thorough and exhaustive opinion, said:

> "Counsel for respondent do not contend that this section of the statute does not authorize the bringing of this suit in the Circuit Court of Pettis County, but insist that said section is void and of no force or effect in cases involving interstate commerce, in that it imposes undue or unreasonable burdens upon interstate commerce, and is therefore in violation of the commerce clause of the constitution, citing the following cases in sup-

port thereof: *Text-book Co.* v. *Pigg,* 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Western Union* v. *Kansas,* 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355; *Norfolk & Western* v. *Pennsylvania,* 136 U. S. 114, 10 S. Ct. 958, 34 L. Ed. 394; *McCall* v. *California,* 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 391; *Pickard* v. *Car Co.,* 117 U. S. 34, 6 S. Ct. 635, 29 L. Ed. 785; *Asher* v. *Texas,* 128 U. S. 129, 9 S. Ct. 1, 32 L. Ed. 369; *Davis* v. *Farmers' Equity Co.,* 262 U. S. 312, 43 S. Ct. 556, 67 L. Ed. 996. We have investigated all these cases, and, without stopping to analyze them here, we are of the opinion that none of them sustain the position contended for by counsel for respondent.

The case of *Davis* v. *Farmers' Co-Operative Equity Co.,* 262 U. S. 312, 43 S. Ct. 556, 67 L. Ed. 996, seems to come nearer to holding what counsel for respondent contends for; yet the facts in that case were so radically different from those of this case, it cannot be held to sustain the insistence made in this case.

In that case the Supreme Court held:

> 'That to permit a suit against the Director General of Railroads, operating a foreign railroad corporation, not operating or owning any line of railroad in the state, to be brought by a non-resident of the state on a cause of action which did not arise in the state, where the only agent of the railroad company upon whom service was had was a mere soliciting agent to solicit foreign traffic to be forwarded over its railroad lines outside of the state, was an undue burden upon interstate commerce and should not be permitted, and that the Supreme Court of the United States had jurisdiction to determine the matter under the commerce clause of the Federal Constitution.'

The facts of this case are that the respondent was the owner and operator of a railroad in this state, and had an agent upon whom service was had, and who transacted the ordinary and usual business of the company in Pettis County, through which the railroad ran.

But, independent of that case, the same court has held that the fact that a corporation is engaged in interstate commerce does not exempt it from suits in the state courts, under the same circumstances and at the same place as though it were not engaged in interstate commerce. *International Harvester Co.* v. *Ky.*, 234 U. S. 589, 34 S. Ct. 947, 58 L. Ed. 1484. * * *

This court has sustained an action against an interstate carrier under the statutes of Missouri, where the bringing of the action constituted a much heavier burden upon interstate commerce than would be imposed by the prosecution of the instant case. Thus it has been held by this court that a foreign corporation might bring a suit in Missouri upon a transitory cause of action against a foreign railroad corporation engaged in interstate commerce, even though the cause of action accrued outside of the state, and the defendant railroad had no line and no agent in the state. The process was served by summoning as garnishee another railroad company which had an agent in the state and which owed a balance to the defendant corporation. *State ex rel. Ry.* v. *Taylor*, 298 Mo. 474, 251 S. W. 383, affirmed by Supreme Court of the United States, November 17, 1924, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. ."

The Santa Fe, under all of the decisions, cannot avoid the defense of this suit in this jurisdiction.

(b) and (c) Service of process was had upon the Rio Grande, by two methods, namely, by attachment and garnishment, and, by personal service upon the

resident general agent. The question presented, therefore, is not merely the propriety of the service, because it must be conceded that attachment of property gives jurisdiction of the court over the property of the defendant, which it must either sacrifice upon judgment or release by other methods, but the real question presented is whether the prosecution of the action against the Denver & Rio Grande would constitute an unreasonable and unnecessary burden upon interstate commerce. The service upon the resident general agent is sufficient to confer jurisdiction over the person of the defendant in so far as our law in relation to service of process is concerned.

Section 728, R. S. Mo. 1929.

Davis v. *Jacksonville Southeast Lines,* 126 Mo. 69, 28 S. W. 965.

State ex rel. Texas Portland Cement Co. v. *Sale,* 232 Mo. 166, 132 S. W. 1119.

Denver & Rio Grande Western Ry. Co. v. *Boller,* 100 Fed. 738 (C. C. A.).

Reynolds v. *M. K. & T. Ry. Co.,* 224 Mass. 379, 113 N. E. 413—certiorari denied 255 U. S. 565, 41 S. Ct. 446.

Neither the Mix case nor the Green case relied upon by petitioners hold to the contrary. But the Mix case was ruled solely upon the fact that to permit the prosecution of that action, based as it was upon the service, would unnecessarily burden and impede interstate commerce.

The sole question in so far as the Rio Grande is concerned, then, is:

"Would the prosecution of this action against the Rio Grande, unnecessarily impose an unreasonable burden upon interstate commerce?"

(d) and (e) The Denver and Rio Grande selected Delaware as the situs of its domicile. The Santa Fe, Kansas, and Curtis, Missouri. Colorado is not the home of any party to the litigation, nor is it the home of all of the witnesses. According to the sworn statement of the Rio Grande, some of the witnesses live in Utah, some in New Mexico. The Circuit Court found (inferentially at least) that some of the witnesses reside in Missouri. Just where could the plaintiff bring his action against these defendants and be free from the charge that the prosecution of the same would burden interstate commerce? Certainly, by the decision of every court in the land, he could sue the Rio Grande in Delaware, unless it should then aver that its legal existence was a mere hoax for the purpose of evading the laws of the states in which it owns a line of railroad and, therefore, only a mere outlaw (which we do not believe it would do). In which event, it would be necessary for it to bring its witnesses four times as far to the place of trial as in the present instance and to pass them directly through the State of Missouri, in so doing.

In the Hoffman case, the Supreme Court said:

"Even a foreign corporation is not immune from the ordinary processes of the courts of a state, where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479. It must submit, if there is jurisdiction, to

the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidently burdened."

The case *State of Missouri* v. *Taylor*, 266 U. S. 200, 45 Sup. Ct. 47, 298 Mo. 474, 251 S. W. 383, seems to be directly in point and decisive of the question of jurisdiction over the Rio Grande. In that case, the American Fruit Growers Association was a citizen and resident of Delaware (it did have an office in Missouri) and brought action against the railway company which had no office or place of business in Missouri and no line of railroad in Missouri. Service of process was obtained by garnishment of traffic balances due from connecting carriers. That company did not enter its appearance, but made application in this court for a writ of prohibition, seeking to prohibit the Circuit Court from taking jurisdiction on the ground that (among other things), the plaintiff in that case could not maintain an action under the Carmack Amendment to the Interstate Commerce Act against a foreign railroad company upon a shipment originating in a foreign state where the railroad company did not have a line of railroad or office in this state. This court held that jurisdiction was properly obtained by attachment and garnishment. Certiorari was applied for to the Supreme Court of the United States, and that court in its opinion (266 U. S. 200, 45 Sup. Ct. 47) held that the Missouri court had obtained jurisdiction by the proceeding in attachment. A footnote to the opinion sheds light on this particular situation in construing the opinion as being applicable to the facts in the

present case. In the opinion, the Supreme Court of the United States, said:

> "Here the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state; *the shipment out of which the cause of action arose was of goods deliverable in Missouri;* and, for aught that appears, the negligence complained of occurred within Missouri. To require that, under such circumstances, the foreign carrier shall submit to suit within a state to whose jurisdiction it would otherwise be amenable by process of attachment, does not unreasonably burden interstate commerce."

The footnote above mentioned refers directly to the statement, "the shipment out of which the cause of action arose was of goods deliverable in Missouri," and is as follows:

> "This is true only of one of the three shipments on account of which the action was brought. But if the inferior court had jurisdiction as to any one, it was obviously proper to deny the writ of prohibition."

That statement applies with great force here. If the state court has jurisdiction to proceed against one of the joint tort feasors, it would be idle to say that proceeding against the other joint tort feasor in the same action would unreasonably burden interstate commerce.

PETITIONERS' AUTHORITIES DISTINGUISHED.

The petitioners rely mainly upon *Michigan Central* v. *Mix*, 278 U. S. 492; *Davis, Director General of Railroads* v. *Farmers Co-op. Equity*, 262 U. S. 312; *Atchi-*

son, Topeka & Santa Fe v. *Wells,* 265 U. S. 101; *Green* v. *Railroad,* 205 U. S. 530.

All of these cases in our judgment are clearly distinguishable from the present case. In the Mix case, the party for whose death action was brought in the Missouri courts, by his widow as administratrix of his estate, was a resident of the State of Michigan, as was his widow until her removal to St. Louis, for the purpose of instituting the suit. In that case concerning that fact, the court said:

> "For aught that appears, her removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit, and because she was advised that her chances of recovery would be better there than they would be in Michigan."

Furthermore, the Michigan Central Railroad Company was a Michigan corporation and a citizen and resident of the State of Michigan. In this case, the Rio Grande is not a Colorado corporation and is not a citizen or resident of that state. Furthermore, in this case, the affidavit filed on behalf of the plaintiff shows that:

> "Plaintiff, Ray Curtis, is and has been during his entire lifetime an actual and *bona fide* resident of the State of Missouri, except for a period of temporary absence while working for the defendants in the State of Colorado; that plaintiff now resides in Trenton, Grundy County, Missouri, in which said county he was born and raised and where his family and parents do now and have for many years resided."

And it further appears from the affidavit that Curtis returned to his home state because he is depend-

ent upon his relatives for support, and to require him to bring his suit in Colorado, would constitute a burden upon him.

In the Mix case, the railroad company doubtless charged that the plaintiff's removal of her residence to St. Louis, was for the sole purpose of instituting an action as the court found, and in that case, it is evident that the plaintiff did not take issue with that statement. However, in this case, the decision of the court in faver of its jurisdiction creates an inference that the Circuit Court found that the return of Curtis to the state of his domicile was not solely for the purpose of instituting the action, but because of physical conditions over which he had no control.

Furthermore, there was no showing in the Mix case that witnesses resided in any place or state other than the State of Michigan. Whereas, in this case, it is admitted by the railroad companies that witnesses reside in states other than Colorado, and it is proven beyond dispute that witnesses reside in the State of Missouri. The further distinction between the two cases is that in this case, the Santa Fe, joint tort feasor, is properly suable in the courts in this state. Whereas, the Michigan Central was alone responsible in the Mix case. Also, while it appears that the action was one under the Federal Employers' Act, yet it does not appear that the attention of the court was directed to the difference between a case under a local state law, which should be interpreted by the courts of that state and a Federal Act applying the same in all of the states.

The Davis Case.

Like the Mix case, there was only one alleged tort feasor in the Davis case. That was The Atchison, Topeka & Santa Fe Railroad Company, a resident of the State of Kansas. The plaintiff in that case was likewise a resident of the State of Kansas. The cause of action accrued in the State of Kansas, and was governed by the laws of that state, and all of the witnesses were residents of that state. There was not the slightest showing that any witnesses resided in the State of Minnesota, or that there was any reason whatever for going to that state and bringing the action. In the case at bar, plaintiff has every good reason for maintaining his action in Missouri, rather than in Colorado.

The Wells Case.

It appears that the facts in the Wells case are that the plaintiff was a citizen and resident of Colorado, and was injured in the performance of his duties in New Mexico. He brought his action in Texas, against the defendant, a Kansas corporation. It did not have any kind of an agent in the State of Texas. That case was ruled upon the reasons stated in the Davis case, and as distinguished from this case, the plaintiff was not a *bona fide* resident of the State of Texas, nor does there appear that any witnesses resided in Texas, nor that any corporation properly suable in Texas, was jointly liable with the Santa Fe. It is also inferable that the action was governed by the laws of New Mexico.

THE GREEN CASE.

That case bears no analogy whatever to the facts in the case at bar. The sole question involved was whether under the United States Statutes, authorized services of process upon the railroad company by service on the agent and the court held that, under the statute, it was necessary to show that the railroad company was doing a railroad business in Pennsylvania, and in the district in which the suit was brought, and that the evidence failed to show that the railroad company was conducting such a business within that district of Pennsylvania, so as to permit the plaintiff to obtain valid service under the statutes of the United States in relation to service of process. Of course, that is not the case here. Service of process under the Federal Statute is not involved in this case. It is the question of service under the Missouri Statute. The question whether or not a burden was inflicted upon interstate commerce by the prosecution of the action was not considered in the Green case. So that case is not authority on any question presented here.

Our Section 728, provides the manner in which writs may be served upon foreign corporations, to-wit:

> "Where the defendant is a corporation or joint stock company, organized under the laws of any other state or country, and having an office and doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, *or if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained* and when had in conform-

ity with this subdivision, shall be deemed personal service against such corporation and authorize the rendition of a general judgment against it" (italics ours).

Evidence presented to the Circuit Court and the return by the sheriff on the summons demonstrates clearly that, under our statute, personal service was had upon the Rio Grande. But as stated before, in any event, the attachment and garnishment was sufficient service, unless the prosecution of the action unnecessarily interferes with and unreasonably burdens interstate commerce.

The case *Griffin* v. *Sea Board Air Line Co.*, 38 Fed. (2d) 98, an opinion by the district judge, does not consider the question of service by attachment and likewise overlooks the distinction between the requirement of the federal statute as to service and the Missouri statute.

The other federal, district court and appeal cases cited by petitioners are of similar nature to the Griffin case, and they do not undertake to construe the Missouri statute, in respect to service nor is the question of service by attachment in any of them.

Conclusion.

In conclusion, we respectfully submit that it is the duty of this court to uphold the jurisdiction of the courts of this state, if it can be done in a lawful man-

ner, and all presumptions are to be indulged in favor of jurisdiction which may be reasonably drawn from the facts, and the burden is on the petitioner to show that the Circuit Court has no jurisdiction of the controversy. As we have stated herein, this necessarily rests upon the question of whether the prosecution of the action as against the Rio Grande unreasonably imposes an unnecessary burden upon interstate commerce.

The Supreme Court of the United States has never determined, and we undertake to say, will never rule that inasmuch as it does not unreasonably burden interstate commerce to require the Santa Fe to defend the action, it would unreasonably cast an unnecessary burden upon its joint tort feasor to come in the same court at the same time, using the same witnesses, and make the same defenses, as made by its co-defendant. Neither reason nor logic would ever support or uphold any such conclusion.

We respectfully submit that the court should not make any order prohibiting the Circuit Court from proceeding in this case.

Respectfully submitted,

MOSMAN, ROGERS & BUZARD,
Attorneys for Defendant.

APPENDIX.

Affidavit and Answer to Motion of Defendant, Denver & Rio Grande Western Railroad Company, to Quash Writ of Attachment and Summons and Service Thereof, and to Dismiss for Want of Jurisdiction.

Comes now the plaintiff and files herein his verified answer to the motion of defendant, Denver and Rio Grande Western Railroad Company, to quash writ of attachment and summons and the service thereof, and to dismiss for want of jurisdiction, and says:

a. He admits that said defendant is a railroad corporation duly organized under the laws of the State of Delaware, and having its principal office and place of business in said state; admits that said defendant is not and never was incorporated in the State of Missouri, and has never been licensed to transact business in Missouri; admits that the defendant owns and operates lines of railroad in the States of Colorado, Utah, and New Mexico, for the transportation of freight and passengers for hire, and admits that said defendant is a non-resident of the State of Missouri.

b. Plaintiff denies that all of the witnesses reside outside of the State of Missouri, and without the jurisdiction of this court, and that witnesses either reside in the States of Colorado, Utah, or New Mexico; denies that the trial of this cause and the proper defense thereof would interfere with or impair the efficient operation of the defendant's lines of railroad or cause the defendant unreasonable, heavy expenses, or would

entail a heavy burden upon or unreasonably obstruct interstate commerce; denies that the attachment of the defendant's property under the writ issued herein unreasonably interferes with, hampers, and obstructs or places an additional unreasonable burden upon said interstate commerce; denies that the plaintiff is a resident of the State of Colorado, and denies the allegation that plaintiff never was at any time a *bona fide* resident of the state; denies that H. F. Kleine, upon whom the summons contained in the writ of attachment was served, is a mere soliciting agent; denies that Kleine was not an officer or agent of said defendant upon whom the process of summons against defendant could lawfully and properly be served; denies that to permit such service would constitute an unreasonable interference with and burden upon interstate commerce, or would be a denial of due process of law to the defendant contrary to or in violation of any of the provisions of the Constitution of the United States; denies that the taking of jurisdiction by this court and the summons and service of writ of attachment would constitute an unreasonable burden and unreasonably obstruct and interfere with interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

c. (1) Plaintiff alleges and states that the defendant, Denver and Rio Grande Western Railroad Company, is jointly liable with the Atchison, Topeka, and Santa Fe Railway Company, in this action to the plaintiff, and that a joint liability is alleged against both defendants, and that the defendant, Atchison, To-

peka and Santa Fe Railway Company, did and does during all of the times in question, own, maintain, and operate a line and system of railroad, railroad tracks, rails, cars, engines, trains, depots, and other equipment within and through the State of Missouri, particularly in the County of Jackson, and did and does do a general and complete railroad business within the State of Missouri, and does and did carry on interstate commerce as a railroad carrier within said state, and plaintiff avers that due and proper service of process has been had in this case upon said defendant.

c. (2) Plaintiff alleges that the plaintiff is a *bona fide* resident of the State of Missouri, and that material and important witnesses to the proper prosecution of this case are and were during all of the times in question, legal and *bona fide* residents of the State of Missouri, and that other witnesses live in various other states and as shown by the motion of the defendant, Denver and Rio Grande Western Railroad Company, herein, said witnesses reside in the States of Utah, New Mexico, and elsewhere.

c. (3) Plaintiff states that at the time of the happening of the event in this case sued upon and at all times since said time, and for a long time before said time, the defendant, Denver and Rio Grande Western Railroad Company, kept and maintained at least two principal offices and places in the State of Missouri, for the purpose of carrying on and doing a general railroad business within this state; that one of said offices is maintained in the City of St. Louis,

Missouri, and there is in charge of said office, one C. N. Gray, who has been appointed by the defendant as its general agent in charge of said office; and plaintiff avers that the defendant maintains another office and place of business in Missouri, to-wit, at 423 Railway Exchange Building, in Kansas City, Missouri, and that H. F. Kleine (upon whom service was had in this case), is and was during all of the times herein mentioned the general agent for said defendant in this county; and plaintiff avers that the said H. F. Kleine, has during all of the times in question been authorized by the said defendant to do any and all necessary acts in connection with the transportation of freight and passengers by the defendant into the State of Missouri; and plaintiff avers that the said defendant keeps and maintains within its office in Kansas City, Jackson County, Missouri, a complete set of books and records appertaining to the movement and disposition of freight and freight shipments into the State of Missouri, in the district over which said office has jurisdiction within said state, and that said defendant, by and through its said agent Kleine, and other agents, employed in this county, did and does maintain a complete survey, check, and supervision of freight shipments originating upon the lines of the defendant and by it agreed to be transported into the State of Missouri; and plaintiff avers that, powers, rights, duties, and obligations of said H. F. Kleine, as agent for said defendant, extended beyond the powers and rights of a mere soliciting agent, but involves a general representative capacity for said de-

fendant, and that the said Kleine, has authority to do all and every other kind of business in the name of and on behalf of said defendant in addition to the duties of soliciting agent, which are or may become necessary or proper in the handling or disposition of defendant's railroad business within the State of Missouri; and plaintiff avers that said defendant does now and did during all the times herein mentioned, own and maintain property within the State of Missouri, and did and does pay property taxes upon said property to the City of Kansas City, and to the County of Jackson and State of Missouri, and plaintiff avers that said Kleine, is such an officer or agent of said defendant upon whom the proper process of summons against said defendant could lawfully or properly be served in this action.

Wherefore, plaintiff prays the court to overrule and deny the motion of the defendant, Denver and Rio Grande Western Railroad Company, to quash the writ of attachment and summons and the service thereof, and dismiss the action for want of jurisdiction.

LESLEY P. ROBINSON,
MOSMAN, ROGERS & BUZZARD,
Attorneys for Plaintiff.

State of Missouri, County of Jackson, ss.

Clay C. Rogers, of lawful age being first duly sworn upon his oath states that he is agent and attorney for the plaintiff and makes this affidavit in his behalf; that he is familiar with the facts set forth in the above and foregoing answer and states that

the facts therein contained are true to the best of his knowledge and belief.

CLAY C. ROGERS.

Subscribed and sworn to before me this 26th day of December, 1930.

(Seal) Elaine Lynn,
Notary Public.

My commission expires August 21st, 1933.

And thereafter, and on the 3rd day of March, 1931, the following further proceedings were had and entered of record in said cause, to-wit:

State of Missouri, at the relation of Denver and Rio Grande Western Railroad Company, and The Atchison Topeka and Santa Fe Railway Company, Relators, vs. Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Respondent.

PROHIBITION.

Now at this day, on consideration of the petition for a writ of prohibition herein to the said respondent, it is ordered by the court here that the said petition be, and the same is hereby denied (all concur, ex. Ragland, C. J. & Atwood, J. dissenting).

State of Missouri, Sct.

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages present a full true, and correct copy of

the record and proceedings in the cause entitled State of Missouri, at the relation of Denver and Rio Grande Western Railroad Company and Atchison, Topeka and Santa Fe Railway Company, relators, against Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, No. 31032, as fully and completely as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and attached the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, state aforesaid, this 2nd day of April, 1931.

(Seal)

J. D. Allen,
Clerk, Supreme Court of the
State of Missouri.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 12, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1261)

FILE COPY

JUN
CHARLES EL

No. 130.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

AGAINST

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY MISSOURI, AT KANSAS CITY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

THOMAS HACKNEY,

Counsel for Petitioner, Denver and Rio Grande Western Railroad Company,

CYRUS CRANE,

Counsel for Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

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No. _____.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

AGAINST

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY MISSOURI, AT KANSAS CITY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Petitioners, Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, respectfully pray for a writ of certiorari to the Supreme Court of the State of Missouri to review a judgment of that Court entered March 3rd, 1931.

The transcript of the record in the case, including the proceedings in the Supreme Court of Missouri, has been filed herewith in accordance with Rule 38 of this Court.

Statement of the Case.

On or about the 21st day of August, 1930, Ray Curtis filed in the Circuit Court of Jackson County, Missouri, his petition (R. 5-10) together with an affidavit in attachment (R. 11) wherein he claimed damages against your petitioners herein jointly, in the sum of $75,000.00 on account of injuries alleged to have been received by him on or about the 26th day of December, 1929, at Pueblo, Colorado, while he was an employee of the Denver and Rio Grande Western Railroad Company in the capacity of assistant signal maintainer or helper at, and while repairing, its interlocking tower at Pueblo, Colorado (R. 22, affidavit of Pyeatt).

Upon the filing of said petition and affidavit, a writ of attachment against said Denver and Rio Grande Western Railroad Company and a summons (R. 12) to both defendants was duly issued under the hand and seal of the Clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, directed and delivered to the Sheriff of Jackson County, and thereafter said sheriff served upon The Atchison, Topeka and Santa Fe Railway Company a summons and writ of attachment and a copy of the petition, pursuant to the statutes, through E. W. Jette (R. 13) described in his return as chief clerk of said defendant corporation, and said sheriff also served a copy of the summons

and attachment writ upon said Denver and Rio Grande Western Railroad Company, through H. F. Kleine (R. 13) described in his return as general agent of said defendant corporation.

The Denver and Rio Grande Western Railroad Company, appearing only for the purpose of its motion (R. 17) moved to quash the original writ and the return of service thereof and to dismiss the action for want of jurisdiction, and in its motion stated, among other things, that the railroad company was incorporated under the laws of the State of Delaware for the purpose of operating a railroad; that its main office was in Denver, Colorado; that it owned and operated lines of railroad in the states of Colorado, Utah and New Mexico; that it had never been licensed to do business in Missouri and had never consented to be sued in said state; that it had never done any business in Missouri except that it maintained an office in Kansas City, Missouri, which at the time of the service of the summons and attachment writ was in charge of H. F. Kleine, upon whom service of said summons and attachment writ was had; that H. F. Kleine was a soliciting agent for the Denver and Rio Grande Western Railroad Company under the title of "agent," and his only business was to solicit freight and passengers for transportation over the lines of said railway company in interstate commerce outside of the State of Missouri; that said Kleine did not sell tickets nor did he receive any payment for the transportation of freight; that he issued no bills of lading covering any shipments of freight from the State of Missouri

over the lines of said railway company; that he did not pay out any money for said railroad company; that he had no authority to make contracts, nor did he make any contracts for said railroad company and that his sole duty was to solicit freight and passenger business as above stated. Said motion also challenged the jurisdiction of the Court on the ground especially that the action would be an unreasonable burden on interstate commerce, in that all the witnesses to the facts and circumstances in connection with the alleged accident reside outside of the State of Missouri and without the jurisdiction of the Circuit Courts of Missouri, their residence being in the State of Colorado, where the alleged accident occurred and where defendant could be served with process.

The Atchison, Topeka and Santa Fe Railway Company, appearing only for the purpose of its motion (R. 25) moved to quash the return of service of process upon it, and in its motion stated, among other grounds, that it was incorporated under the laws of Kansas; that the controversy upon which the pretended cause of action set forth in plaintiff's petition purports to be based and on which the service of process upon it was based arose in Colorado while plaintiff was an employee of the Denver and Rio Grande Western Railroad Company engaged in the service of said railroad company, and that all of the witnesses to the facts and circumstances involved in the suit, necessary to establish the defense of The Atchison, Topeka and Santa Fe Railway Company, were employes of the Denver and Rio Grande Western Railroad Company and reside

outside of the State of Missouri and without the jurisdiction of the Circuit Court of Jackson County, Missouri, and reside in the State of Colorado when service of process could be had on both defendants.

After a hearing upon your petitioners' motions to quash the returns of service in the State Circuit Court, those motions were separately denied by that Court (R. 33).

Whereupon, your petitioners, availing themselves of the right to a writ of prohibition given them by the Constitution and statutes of Missouri, filed in the Supreme Court of Missouri their petition for a writ of prohibition (R. 3) directed to the Hon. Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, in which they set forth in detail all of the foregoing facts, including therein a copy of the petition (R. 5) filed by Ray Curtis against your petitioners, copies of the returns of service made by the sheriff of Jackson County, Missouri, at Kansas City (R. 13) and a copy of the motions to quash these returns (R. 17-20, 25-28) and a copy of the rulings thereon (R. 33).

In the petition so filed in the Supreme Court of Missouri your petitioners invoked the rights given them by Section 8 of Article I of the Constitution of the United States, the Commerce Clause (R. 20) and also of Section 1 of Article XIV of the Amendments to the Constitution of the United States (R. 20) the due process clause.

In said petition your petitioners asserted that if the laws of Missouri should be so construed as to con-

fer jurisdiction on the Circuit Court of Jackson County, Missouri, over your petitioners and over the cause of action asserted against them, such laws were, to that extent, void because in conflict with the constitutional provisions above mentioned (R. 40).

The petition thus presented to the Supreme Court of Missouri was verified and was accompanied by suggestions (R. 43) in which were set out the rulings of this Court in the cases referred to in our brief filed herewith, and in other cases.

The petition for a writ of prohibition was filed on the 3rd day of February, 1931 (R. 1) and on March 3, 1931 (R. 88) the Supreme Court of Missouri entered final judgment, without filing written opinion, denying the petition for a writ of prohibition (Ragland, Chief Justice, and Atwood, J., dissenting).

Questions Presented.

Under this record the following important questions are presented:

1. Is it not an undue and unreasonable burden upon interstate commerce, under repeated decisions of this Court, to permit a state court in Missouri to take jurisdiction and hear and determine a suit brought by Curtis as plaintiff, under the Federal Employers' Liability Act, for personal injuries alleged to be due to negligence, against his employer, the Denver and Rio Grande Western Railroad Company (petitioner), which alleged injuries were received at the place of plaintiff's residence in the State of Colorado (although he acquired a residence in Missouri before the bringing

of this suit); when it is made to appear that the Denver and Rio Grande Western Railroad Company was and still is a corporation organized under the laws of Delaware, licensed to do business in Colorado, but not in Missouri, and having no tracks and operating no trains in the State of Missouri, and doing no business in said state other than soliciting freight and passengers to be carried over its lines entirely outside of Missouri, and having no office or place of business in the State of Missouri, except offices in Kansas City and St. Louis in said state for the use of its freight and passenger solicitors; and when it is further made to appear that all of the witnesses by whom said defendant railroad company must establish its defense are its employes residing in the State of Colorado who must, at great expense to defendant be brought to Missouri and maintained there during the trial?

2. If it be found that such a suit against the Denver and Rio Grande Western Railroad Company, when brought in Missouri, is an undue and unreasonable burden on interstate commerce, can the action be maintained in said state by reason of the fact that plaintiff has joined as a codefendant The Atchison, Topeka and Santa Fe Railway Company (petitioner), an interstate railroad organized under the laws of the State of Kansas and operating, under a license, its railroad into and through the State of Missouri, when it is alleged by plaintiff that there is joint liability only because of some alleged operating contract existing between the two defendants, and when it is further made to appear that the Santa Fe Company must use

in its defense the same employes of the Denver and Rio Grande Western Railroad Company, and that they must likewise, in such defense, be brought from Colorado to Missouri for the trial; and when it also appears that the Santa Fe Company can be sued and served with process in the State of Colorado?

Reasons for Allowance of the Writ.

The decision of the Supreme Court of Missouri (without any written opinion having been filed) in effect decided that the Circuit Court of Jackson County, Missouri, at Kansas City, has jurisdiction of a suit brought against your petitioners—foreign railroad corporations—one of whom, the Denver and Rio Grande Western Railroad Company, has no tracks or property in Missouri, has not consented to be sued in said state and does no business in Missouri other than the solicitation of freight and passenger business, and the other of whom, The Atchison, Topeka and Santa Fe Railway Company, while not incorporated in the state, does business therein under a license or permit, upon an alleged cause of action which did not arise or accrue in the State of Missouri, but arose in a foreign state while the plaintiff was an employe of and engaged in the service of your petitioner, Denver and Rio Grande Western Railroad Company, in said foreign state where the plaintiff resided at the time of the injury complained of.

It is respectfully insisted that the decision of the Supreme Court of Missouri is not in accord with the decisions of this Honorable Court in *Michigan Central Railroad Co.* v. *Mix et al.*, 278 U. S. 492; *Davis* v.

Farmers Co-operative Equity Company, 262 U. S. 312, and in *Atchison, Topeka and Santa Fe Railway Company* v. *Wells*, 265 U. S. 101, all holding that the commerce clause of the Constitution prohibits the maintenance of such suits under the conditions specified. Furthermore, it is in conflict with the decisions of the Supreme Court of the United States in the cases of *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Railway Co.* v. *McKibben*, 243 U. S. 264; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, and other cases holding that to permit such suits being maintained under the circumstances specified would be violative of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner, Denver and Rio Grande Western Railroad Company has had a number of suits filed against it in Missouri, which it has been called upon to defend at great expense, and in which it has been confronted with the claim that it can be sued in Missouri because of the presence in that state of said petitioner's agent, such claim being based upon the expressions of the Supreme Court of Missouri in the cases of *State ex rel. Sale*, 232 Mo. 167, and *Davis* v. *Jacksonville Southeastern Line*, 126 Mo. 69, in which the Supreme Court of Missouri held that service upon a soliciting freight agent is valid under the statutes of Missouri.

The record now before this Court is complete. Your petitioners respectfully urge that the case is one involving questions of law of importance to your petitioners and other railroads engaged in interstate

transportation and that the situation imperatively calls for clarification in the interest of the railroads in order that they may be relieved from the unnecessary and unreasonable burden imposed upon them and upon interstate commerce by the defense of such suits in jurisdictions foreign to and far distant from the place of accident.

Wherefore, your petitioners pray that a writ of certiorari issue to the Supreme Court of the State of Missouri commanding said Court to certify and send to this Court for its review and determination, on a day to be designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Missouri had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Supreme Court of Missouri be reversed, and that petitioners be granted such other and further relief as may seem proper. Dated, Kansas City, Missouri, May, 1931.

THOMAS HACKNEY,
Counsel for Petitioner, Denver and Rio Grande Western Railroad Company.

CYRUS CRANE,
Counsel for Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

No opinion filed.

Jurisdiction.

The final judgment of the Missouri Supreme Court now to be reviewed, was entered on March 3, 1931 (R. 88). The jurisdiction of this Court is invoked under Section 237b of the Judicial Code (U. S. Code, Title 28, S. 344, 43 Statutes, 937.)

The right of this Court to review by certiorari the questions herein presented, is clearly recognized by late cases decided by this Court:

Michigan Central R. R. Co. v. *Mix*, 278 U. S. 492.

Davis v. *Farmers Co-operative Equity Co.*, 262 U. S. 312.

STATEMENT.

The principal facts have already been set forth in the petition, *supra* pages 1 to 10. A summary of the argument appears in the index.

ARGUMENT.

(1) Jurisdiction Considered Under the Commerce Clause.

The essential facts in this suit are almost parallel with those considered by this Court in the case of *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492. One difference lies in the fact that in the case at bar there

are two defendants, both foreign corporations, one of whom has been licensed to do and does business within the state, and the other of whom has not been licensed and does not do business in the state other than to solicit freight and passenger business to be done and performed entirely outside of the State of Missouri, which latter company is in the same situation as is the Michigan Central in the *Mix* case.

In the case at bar the plaintiff, Ray Curtis, was an employe of the Denver and Rio Grande Western Railroad Company, a Delaware corporation, and while engaged in the performance of his duties for that company in repairing its interlocking plant at Pueblo, Colorado, claims to have been injured, and said suit was brought to recover damages on account of said alleged injuries. At the time of the alleged accident and injury, Ray Curtis, the plaintiff, was living at Pueblo, Colorado, and resided there until July or August, 1930, when he moved to Trenton, Missouri, and shortly thereafter instituted his said suit against your petitioners in the Circuit Court of Jackson County, Missouri, so the circumstances of the citizenship of the plaintiff in the case here under consideration and the plaintiff in the *Mix* case are quite similar.

The *Mix* case was an action brought in the State of Missouri against the Michigan Central Railroad Company to recover damages for the death of a switchman employed by defendant in Michigan and killed while in the performance of his duties. He was then a resident of Lansing, Michigan. Shortly after his death his wife moved to Missouri, was appointed

administratrix of his estate at St. Louis, and as such brought her suit for damages. The defendant railroad was a Michigan corporation, with no part of its railroad in Missouri. It had never been licensed to do business in Missouri and had never done any business there except to solicit freight for transportation in interstate commerce in other states. For this limited purpose it maintained an office at St. Louis and upon the agent in charge of that office the sheriff made service of summons.

The Court held that the mere fact that plaintiff had acquired a residence in Missouri before commencing the action did not make reasonable the imposition on interstate commerce of the heavy burden which would be entailed in trying the case in a state remote from that in which the accident occurred.

The judgment of the Supreme Court of Missouri denying the application of the railroad company for a writ of prohibition from trying the action brought under the Federal Employers' Liability Act was reversed.

In the case of *Davis* v. *Farmers Co-operative Equity Corporation*, 262 U. S. 312, both the plaintiff and defendant were residents of Kansas, and suit was brought in a Minnesota state court, where service of process was attempted upon a freight solicitor. The cause of action arose in some state other than Minnesota. This Court decided that to permit such a suit to be maintained would constitute an unreasonable burden upon interstate commerce, and that the Minnesota statute which attempted, under such circumstances, to

vest jurisdiction in its state court, was violative of the commerce clause of the Constitution of the United States, and, therefore, void. In so holding this Court said:

> "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to suit in a state in which the cause of action did not arise in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers, efficiently operated, a fair return on property devoted to the public use. * * * Avoidance of waste in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

The considerations which prompted the Court to the conclusions which it expressed were pointed out to the Supreme Court of Missouri in this case. In the petition it was shown (R. 38, 39) that all of the witnesses who might be required in the defense of the Curtis case in the Circuit Court of Jackson County, Missouri, resided in Colorado where the cause of action accrued; that the railroads' witnesses were employed by the Denver and Rio Grande Western Railroad Company, in Colorado in the operation of its railroad; that

these witnesses would have to be brought to Kansas City at great expense, and that the employment of others to assist in the operation of the railroad would entail an additional expense.

In the case of *Atchison, Topeka and Santa Fe Ry. Co.* v. *Wells,* 265 U. S. 101, a suit for personal injuries was brought in Texas by a citizen of Colorado against the Santa Fe, which is a Kansas corporation. In deciding that the judgment obtained against the Santa Fe in Texas was void, this Court said:

> For the reasons stated in *Davis* v. *Farmers Co-operative Corp.,* 262 U. S. 312 (decided since the entry of the judgment here under review), such a suit necessarily and unreasonably burdens interstate commerce and the statute as construed and applied is invalid.

The burden upon interstate commerce is present in the case at bar, just as it was in the *Mix,* the *Davis* and the *Wells* cases. The plaintiff, apparently, has removed to Missouri, but he did so after the cause of action had accrued. At the time of the alleged accident he had resided for a considerable period at Pueblo, Colorado, where all of the witnesses resided—his as well as the railroads'—and where he could have tried his case at a minimum of expense to himself and to the railroad companies.

In *State ex rel.* v. *Taylor,* 266 U. S. 200, this Court had occasion again to consider the application of the principles announced in the *Davis* and *Wells* cases. It was held in that case that the facts presented did not bring it within the ruling in the Davis and Wells

cases, and in consequence the jurisdiction of the state court was sustained. There the plaintiff, although a Delaware corporation, maintained a usual place of business in Missouri. The defendant was a Texas railroad company which did not enter Missouri, maintained no offices in Missouri and had not consented to be sued in Missouri. The suit was one of attachment for damages to freight originating in Texas and destined (some of it) to Missouri. Under these circumstances this Court held that the state court had jurisdiction. The distinctions between that case and the case at bar are to be noted as follows:

First. That was a proceeding *in rem* in which no personal judgment was sought, nor could such be entered. As to such proceedings *in rem* different rules of law are applicable (*Pennoyer* v. *Neff*, 95 U. S. 714).

Second. The plaintiff was, in a practical sense, a resident of Missouri.

Third. The negligence, for aught that appears, occurred in Missouri.

Fourth. The shipment was destined to Missouri.

Fifth. There was only one defendant in that case.

These differentiating elements were all absent in the present case at the time the cause of action accrued, and this case is, therefore, to be determined by what was said in the Mix, the Davis and the Wells cases.

(2) Jurisdiction Considered Under the Fourteenth Amendment.

In *Davis* v. *Farmers Co-op. Equity Corp., supra,* this Court having decided that the commerce clause of the Constitution deprived the state court of Minnesota of jurisdiction over the suit there pending, thought it unnecessary to decide whether such jurisdiction was also repugnant to the Fourteenth Amendment, but in so expressing itself felt constrained to refer to cases in which it had been decided that in similar situations the Fourteenth Amendment forbade jurisdiction in state and federal courts.

In *Green* v. *C. B. & Q.,* 205 U. S. 530, the suit was brought in the United States Circuit Court in Pennsylvania, by a citizen of Pennsylvania, to recover damages for personal injuries sustained in Colorado through negligence of the Chicago, Burlington and Quincy Railroad Company, whose lines of railroad did not extend into Pennsylvania and whose only business in Pennsylvania was that of soliciting freight through a freight solicitor. This Court held that the solicitation of freight was not sufficient to bring the defendant railroad company within the jurisdiction of the federal court in that state. No reference was made in the opinion to the due-process clause of the Constitution.

The ruling in the *Green* case was followed in the case of *P. & R. Ry. Co.* v. *McKibben,* 243 U. S. 264, in which the Court prefaced a consideration of the facts and laws by saying:

> "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."

In that case the plaintiff, a citizen of New York, brought suit in the District Court of the United States for the Southern District of New York against the railroad, a Pennsylvania corporation, for a personal injury sustained in New Jersey.

In *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, being a suit commenced in a United States District Court, this Court, in considering whether the transaction of certain business was sufficient to subject a corporation to suit in a foreign jurisdiction, said:

> The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is by its duly authorized officers or agents present within the state or district where service is attempted.

And, again:

> As to the continued practice of advertising its wares in Louisiana and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this Court have settled the law to be that such practice did not amount to their doing that business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it.

In the case of *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, the suit was brought in a New York state court and removed to a federal court. The plaintiff was a New York corporation. The defendant was an Oklahoma corporation. This Court affirmed the decision of the District Court, holding that the suit could not be maintained.

In *Chipman* v. *Jeffries Co.*, 251 U. S. 373, the suit was begun in a state court of New York and removed to the federal court. The plaintiff was a New York corporation. The defendant was a Wisconsin corporation. The cause of action apparently arose in New York where the suit was brought. Upon consideration of the statute of New York under which service had been obtained this Court reached the conclusion that under the decisions of the highest appellate court of New York jurisdiction could not be maintained, but in so disposing of the case this Court said:

> In resting the case on New York decisions, we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance, whatever the decision of the State Court, and refer to *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Louis S. W. Rwy. Co.* v. *Alexander, supra; Philadelphia & Reading Rwy. Co.* v. *McKibbin*, 243 U. S. 264; *Meisukas* v. *Greenough, Red Ash Coal Co.*, 244 U. S. 54; *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79.

From the foregoing decisions it will appear that the rule excluding jurisdiction in cases where it is attempted to subject the defendant to a foreign jurisdiction because of the transaction of business done by drummers or soliciting freight agents, is applied in

cases originating in the state courts as well as those originating in the federal courts. These cases, and what is said in the opinions, exclude the thought that this Court was deciding the simple question of service of process. The citation of Pennoyer vs. Neff, in the Chipman case, *supra*, gives point to the language of this Court in the cases above referred to. In Pennoyer vs. Neff, the Court was dealing with the fundamental question of what would and what would not be due process under the Constitution of the United States. This Court has in the cases referred to emphasized the fundamental proposition that a corporation cannot, in the absence of its consent, be compelled to defend a suit *in personan* (as distinguished from a suit *in rem*) in a jurisdiction where it does not transact business of a kind or to a degree which can be taken as a submission to that jurisdiction by the transaction of business therein. That in so deciding this Court had in mind the due-process clause of the Constitution is further shown by what is said in *Simon* v. *Southern Ry.*, 236 U. S. 115, to which we refer without burdening the Court with a review of the questions discussed and decided.

Conclusion.

We respectfully submit that the decision of th Supreme Court of Missouri is in conflict with and contrary to the decisions of this Honorable Court and for that reason a writ of certiorari should issue in order that the rulings on questions arising under the Employers' Liability Act may be uniform. The very uncertainty of the Appellate Court of Missouri

as to the law of this case, indicated by the dissent of two of the justices of that Court, is a cogent reason why it should be reviewed here by certiorari. Inasmuch as the decision of the Supreme Court of Missouri is in direct conflict with decisions of this Honorable Court the subject is one which demands the clarification which can only come from a decision of this Court.

It is therefore respectfully submitted that a writ of certiorari should issue as prayed.

Respectfully submitted,

THOMAS HACKNEY,

Counsel for Petitioner, Denver and Rio Grande Railroad Company.

CYRUS CRANE,

Counsel for Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

Office Supreme Court, U. S.
FILED
AUG 25 1931
CHARLES ELMORE CROPLEY
CLERK

No. 130.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

VS.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, MISSOURI, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLAY C. ROGERS,
Counsel for Respondent.

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No. 130.

IN THE

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OCTOBER TERM, 1930.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

VS.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, MISSOURI, RESPONDENT.

STATEMENT OF THE CASE.

The respondent contends that the petitioners have failed to make a fair, accurate and complete statement of the case pursuant to Rule 25 of this court. The facts show that under decisions of this court they have no right to the writ.

Transcript of Record and Brief Untimely Served.

The papers in this case were filed June 3, 1931, but copies of the transcript of record, petition and brief were not served upon respondent until July 15, 1931.

Issues Made in the State Court.

The suit was instituted in the Circuit Court of Jackson County, Missouri, it being a court of general jurisdiction and having cognizance of such actions. The petition of the plaintiff alleges a joint cause of action against both defendants for injuries sustained by him while working for said defendants in and about the repair and operation of an interlocking plant and signal device at Pueblo, Colorado, owned by the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as "Santa Fe" (R. 5). Plaintiff was working under the orders of the Denver and Rio Grande Western Railroad Company, hereinafter referred to as "Rio Grande," but was doing work for both defendants (R. 5, 6, 7, 8, 9). Because of the negligent acts of both defendants, jointly concurring, he was injured. *Petitioners do not contend, in any papers filed by them, that joint liability does not exist against the defendants.* Summons was served upon the Santa Fe in the manner provided by the law of Missouri (no question is raised about the validity of the service of process, as such, on that defendant). Writ of attachment and summons was issued against the Rio Grande and service was had upon H. F. Kleine

as *general agent* in charge of the commercial office of said company in Jackson County (R. 13).

Service was also had upon the Rio Grande by attaching and garnishing the freight credits and money due it in the hands of other railroad corporations (R. 12-14).

The Rio Grande filed, in the state court, its motion to quash the writ of attachment and summons and service thereof and to dismiss for want of jurisdiction, wherein it alleged, among other things, that it never did own or operate any railroad in Missouri; that the witnesses to the facts and circumstances involved in the action reside outside of the State of Missouri "and each of said witnesses resides either in the States of Colorado, Utah, or New Mexico" (R. 19); that the trial of the case in Missouri would unreasonably obstruct interstate commerce in which said defendant is actually engaged in said States of Colorado, Utah, and New Mexico; that the attachment of its property would likewise unreasonably burden interstate commerce; that plaintiff neither at the time he was injured, nor at any other time, was a *bona fide* resident of Missouri; that Kleine, the agent upon whom the summons was served, was merely a *soliciting agent* and had no authority to do any kind of business other than soliciting. The Santa Fe filed a similar motion with similar allegations. However, it alleged that it was engaged in carrying on business in Missouri.

To the motion of the Rio Grande, the plaintiff filed his answer and affidavit wherein denial was made, under oath, of the allegations contained in de-

fendant's motion to quash except the corporate existence and its operation of railroads, etc. Said verified answer specifically alleged:

1. Joint liability existing against both defendants.

2. That plaintiff is a *bona fide* resident of Missouri and material and important witnesses are residents of Missouri and that other witnesses live in various other states, namely: Utah, New Mexico, Colorado, and elsewhere.

3. That said defendant had for a long time kept and maintained two principal offices in Missouri for the purpose of carrying on and doing railroad business in the state—one of said offices in St. Louis, and the other in Kansas City, and that Kleine (upon whom service was had) was the general agent for that defendant and had been authorized by said defendant to do any and all necessary acts in connection with transportation of freight and passengers by defendant into Missouri; that defendant maintains in its office in said state a complete set of books and records appertaining to the movement and disposition of freight into Missouri and that the powers, rights, duties and obligations of said Kleine extend beyond the powers of any mere soliciting agent but involve a general representive capacity; said defendant pays property taxes upon the property owned by it and kept within the state, to the State of Missouri.

Verified answer and denial was likewise filed to the motion of the Santa Fe. Upon the issues thus

made, the jurisdictional question was presented to the state court for trial and in support of the motions of defendants, the verified motions were offered and in addition thereto the affidavit of Pyeatt, president of the Rio Grande, in which he deposed that plaintiff had been a resident of Pueblo, Colorado, from April or May, 1927, until August 20, 1930 (his injury occurring December 26, 1929), when he moved to Trenton, Missouri. Other statements in the affidavit are generally supportive of the allegations in the motion.

In opposition, the plaintiff offered his verified answers to said motions and affidavit, and the deposition of General Agent Kleine. The affidavit of plaintiff's attorney made for plaintiff established that plaintiff, during his entire lifetime, had been a *bona fide* resident of Missouri except for a period of temporary absence while working for defendants in Colorado; that he was born and raised and now lives in Grundy County, Missouri, where his parents do now and for many years have resided; that a joint cause of action exists against both defendants; that the witnesses whose testimony is necessary to prove plaintiff's case, reside in Missouri, Colorado, Utah, New Mexico, and elsewhere, and are not confined in the State of Colorado; that at least six of plaintiff's witnesses reside in Missouri; that all of the witnesses and the only witnesses who could be used in the defense of the case by the Rio Grande are the same witnesses necessary to the defense of the case by the Santa Fe; that plaintiff is wholly disabled from engaging in any occupation and is unable to make a livelihood and

has no means of support except by the aid of his relatives, and to require him to go to the State of Colorado and there institute and prosecute an action against the defendants, would be burdensome and unjust and would require such an outlay of money as would prevent him from obtaining justice (R. 31, 32, 33).

The deposition of General Agent Kleine (R. 55-62 inclusive), shows him to be general agent for the Rio Grande and in charge of the office of said company, which is maintained in Kansas City, having acted for the defendant in that capacity for five years. Said defendant pays rent for three offices, which it maintains in Kansas City, and said offices have been continuously maintained for more than ten years. Four employees of said company are employed at said office and their salaries are paid by said defendant. The company pays taxes, both state and city, on its office furniture, to Kansas City and the State of Missouri. From the Kansas City office information is given to shippers and consignees concerning the arrival and delivery of the shipments or any information as to their whereabouts and things of that sort. This is usual and customary and is a part of the business. At said office a complete record is kept of all freight shipments coming into this territory for tracing purposes. The Rio Grande also maintains an office in St. Louis, Missouri, and communications pass between the Kansas City and the St. Louis office and other offices in respect to transportation of freight and passengers from Colorado into Missouri, and oc-

casionally upon instructions from the company, General Agent Kleine will look after invalids or distinguished persons or other passengers upon their arrival at the station in Kansas City. "Q. And that, of course, is a part of your railroad business, isn't it? A. Yes" (R. 62).

Upon the issues raised by the pleadings and the evidence the state court determined the question of jurisdiction against the defendants.

QUESTIONS PRESENTED.

Respondent denies that petitioners have correctly stated the important questions presented by the record, and avers that the questions properly presented are:

1. Does not the State of Missouri, through its legally constituted courts, have the inalienable right, under powers retained by said state, to assume jurisdiction of a controversy based upon a transitory cause of action arising in Colorado (under the Federal Employers Liability Act), brought by a *bona fide* resident of Missouri, against the Rio Grande, a railroad company engaged in carrying on interstate commerce, when it is made to appear that said railroad company is jointly liable and jointly sued with the Santa Fe, which said Santa Fe is licensed to do business in Missouri, has consented to be sued there, operates a railroad through said state, does both interstate and intrastate business in said state; when it further appears that the Rio Grande is a corporation organized under the laws of Delaware, but operating a railroad in Colorado,

Utah and New Mexico; when it further appears that the Rio Grande maintains at least two offices in Missouri (one in Jackson County where the suit was brought), and that it employes a general agent in Missouri, *whose duties are not confined to mere solicitation of business,* but who keeps a record of all freight shipments originating upon the lines of said company, and coming into said state, and whose further duty it is to trace freight shipments coming into said state and give information concerning same; when it further appears that said railroad company pays taxes to the State of Missouri, upon the property owned by it and permanently located in said state; when it further appears that service of process, according to the laws of Missouri, was had upon said Rio Grande, by service upon said "General Agent," in the manner provided by the laws of Missouri; when it further appears that the property of said Rio Grande was seized by said state by writ of attachment, and garnishment, according to the laws of said state and jurisdiction of the property of said defendant in said controversy thereby obtained; and when it further appears that witnesses material to the trial of the controversy reside in Missouri, Utah, New Mexico and Colorado, and that the witnesses necessary to the defense *do not* all reside in Colorado?

2. If the Santa Fe is properly suable in Missouri upon such a cause of action and if an unreasonable burden is not impressed upon interstate commerce by requiring it to defend such action, is an undue and unreasonable burden imposed upon interstate commerce

by requiring its co-defendant, Rio Grande, to make a joint defense against the cause of action which is jointly against both defendants, when it appears that witnesses reside in the States of Missouri, Colorado, Utah and New Mexico and are the same and only witnesses necessary in any defense presented by the Santa Fe?

REASONS FOR DENIAL OF WRIT.

I.

The Supreme Court of Missouri in holding that the Jackson County Circuit Court had jurisdiction of the controversy, in conformity with decisions of this court, properly determined:

(a) The Santa Fe, having entered the State of Missouri—having consented to be sued there—operating a railroad doing both interstate and intrastate business in said state—is properly suable in said state, by a *bona fide* resident thereof, upon a cause of action in tort arising in a foreign state.

Hoffman v. *State of Missouri*, 274 U. S. 21.
Same case, 309 Mo. 625.
Section 742, R. S. of Mo., 1929.
Railroad Company v. *Harris*, 76 U. S. 65.
Pennsylvania Fire Ins. Co. v. *Gold Issue Min. & Mill. Co.*, 243 U. S. 93.

(b) Service of process upon the general agent of the Rio Grande at the office and place of business of that defendant in Missouri is sufficient to give the Missouri court jurisdiction, *in personam*, of that

defendant—absent an unreasonable burden on interstate commerce in the prosecution of the suit.

State ex rel. Portland Cement Co. v. *Sale,* 232 Mo. 166.
Davis v. *Jacksonville Southeastern Line,* 126 Mo. 69.
New York, etc. R. R. Co. v. *Estill,* 147 U. S. 591.

(c) The attachment and garnishment of the property of the Rio Grande in Missouri is sufficient to give the Missouri court jurisdiction, *in rem,* of that defendant.

Section 743, R. S. of Mo., 1929.
Davis v. *Railroad Company,* 217 U. S. 157.
State of Missouri v. *Taylor,* 266 U. S. 200.

(d) Interstate commerce is not unreasonably burdened by requiring the Rio Grande to submit to jurisdiction in this case.

State of Missouri v. *Taylor, supra.*

II.

Jurisdiction invoked is not a violation of the Fourteenth Amendment.

State of Missouri v. *Taylor, supra.*

ARGUMENT.

I.

Jurisdiction As to Santa Fe.

(a) *The Santa Fe operates a railroad in Missouri, is licensed to do business there, has thereby consented to be sued in said state and is therefore amenable to the jurisdiction of the courts of that state.*

The action against the Santa Fe is *bona fide*. The petitioners do not question that fact. The liability of the Santa Fe to plaintiff, Curtis, is joint with that of the Rio Grande.

The plaintiff is a *bona fide* resident of Missouri, and that issue has been determined in favor of the plaintiff by the state court. Questions of fact are not reviewable on certiorari to this court (*New York Dock Co.* v. *Poznan et al.*, 274 U. S. 117).

The mere fact that the cause of action arose in a foreign state while plaintiff was residing therein does not relieve the Santa Fe of amenability to the jurisdiction of Missouri courts. The decision of the Supreme Court of Missouri in determining that the inferior court had jurisdiction of the cause as against the Santa Fe is directly in accord with the decision of this court in *Hoffman* v. *State of Missouri*, 274 U. S. 21. The analogy between the two cases is clear.

In the Hoffman case the cause of action, based upon the Federal Employer's Liability Act, arose in Kansas, where the employee, whose death ensued as

a result of the tort, resided in Kansas, and where the administrator of his estate also resided. The action was brought in Missouri against the railroad company which was licensed to, and was doing business in Kansas and subject to the jurisdiction of the Kansas courts. Objection was made to the prosecution of the action in the Missouri court on the ground that to require the railroad company to bring its witnesses from Kansas into Missouri to defend the case would constitute an unreasonable burden on interstate commerce. The Circuit Court of Pettis County, Missouri (place where the action was commenced), refused to entertain jurisdiction of the case upon the grounds of which objection was made. Upon application for mandamus at the relation of the administrator, to compel the Circuit Court to take jurisdiction, the Supreme Court of Missouri (*State ex rel. Foraker* v. *Hoffman, Judge,* 309 Mo. 625), held that the action was properly maintainable in Missouri. Upon writ of error from that decision, this court held that the state court had jurisdiction of the action.

It is true that in the Hoffman case the defendant railroad company was incorporated under the laws of Missouri. However, that feature does not distinguish it from the case at bar for the reason that the Santa Fe has been admitted to do business in the State of Missouri—is licensed therein as a foreign corporation—and consequently subject to all rights, remedies and obligations of a domestic corporation. Section 742, R. S. Mo. 1929 (quoted in appendix). Can it be that the mere fact that the action, based upon a

tort occurring in a distant state, prosecuted in the state where the railroad company is incorporated (as in the Hoffman case), and which does not constitute an unreasonable burden on interstate commerce, would on the other hand, unreasonably burden interstate commerce if prosecuted in the courts of a state wherein the railroad company is admitted to do business and is actually engaged in both interstate and intrastate commerce although not incorporated there? Will this court promulgate such a rule of law?

It was early recognized in the case of *Railroad Company* v. *Harris*, 12 Wallace 65, 79 U. S. 65, that a foreign railroad corporation entering a state and having a line of railroad there is subject to the jurisdiction of the courts of that state, although there was no express consent by the corporation to be sued in that particular case in that state. The court, however, held that by building a railroad into the state, the corporation impliedly consented to be sued there.

The objection to the prosecution of the action against the Santa Fe on the ground that it would constitute an unreasonable burden on interstate commerce, is answered by the fact that the Santa Fe has consented to be sued in Missouri, and in all of the cases relied upon by petitioners, lack of jurisdiction was predicated upon the absence of consent to be sued within the state. This court in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Min. & Mill. Co.*, 243 U. S. 93, has directly held that the consent of the foreign corporation to be sued within a state upon a cause of action arising outside of the state is to be implied from the act of

appointing an agent upon whom service of process may be had within such state.

When the Santa Fe undertook the operation of its trains within the State of Missouri and obtained its license to do business in said state it became accountable to the service of process under the laws of Missouri and to the jurisdiction of Missouri courts. Section 4598, R. S. Mo. 1929, (quoted in appendix), requires the foreign railroad corporation to appoint and designate an agent within the State of Missouri upon whom the service of process may be had. The Supreme Court of Missouri has directly held that foreign railroad corporations are suable in Missouri in an action brought by a non-resident on a cause of action under the Federal Employer's Liability Act arising in another state (*Bright* v. *Wheelock*, 323 Mo. 840, 20 S. W. (2d) 684; *Shaw* v. *Chicago & Alton R. Co.*, 314 Mo. 123, 130, 282 S. W. 416; *Wells* v. *Davis*, 303 Mo. 388, 261 S. W. 58; *State of Missouri, ex rel. Foraker* v. *Hoffman*, 309 Mo. 625, 274 S. W. 362). In the case of *Bright* v. *Wheelock, supra,* the Missouri Supreme Court further held that it is the duty of the Missouri courts to take jurisdiction of such cases, and that said courts do not have discretion to refuse to entertain jurisdiction in such cases as held in the case of *Douglas* v. *Railroad Company*, 279 U. S. 377.

If the Hoffman case, *supra*, by this court, has any value as *ratio decidendi*, it is to determine that in future litigation involving essentially the same facts, this court will in those cases apply the same rule of

law and arrive at the same conclusion as in the Hoffman case.

Under the decisions of this court, it appears that no unreasonable burden is placed upon interstate commerce by requiring the Santa Fe to submit to the jurisdiction of Missouri courts.

Jurisdiction As to Rio Grande.

(b) *Service of process upon the General Agent of the Rio Grande at the office and place of business of that defendant in Missouri, is sufficient to give the Missouri court jurisdiction, in personam, of that defendant—absent an unreasonable burden upon interstate commerce in the prosecution of the suit.*

This question is one which involves solely the construction placed upon the Missouri service statutes by the Supreme Court of Missouri, without regard to whether or not such service in this particular case is an unreasonable burden on interstate commerce.

In *State ex rel., Texas Portland Cement Co.* v. *Sale,* 232 Mo. 166, and *Davis* v. *Jacksonville Southeastern Line,* 126 Mo. 69, the Supreme Court of Missouri held service such as here obtained upon General Agent Kleine, sufficient to confer jurisdiction over the person of defendant. It would seem that the Supreme Court of Missouri inferentially held the service to be good in this case by the denial of the writ of prohibition. It certainly held such service good in *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492. This court has never denied the right of a state court to construe its service statutes, absent questions relating to due process and interstate commerce. In fact, the service statutes

of Missouri in such cases have been construed by the court to give jurisdiction in *New York, etc. R. R. Co.*, v. *Estill*, 147 U. S. 591, and in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Min. & Mill. Co., supra.*

Obviously, the service, as such, upon General Agent Kleine is sufficient to give the Missouri Court jurisdiction, *in personam*, of the Rio Grande.

(c) *The attachment and garnishment of the property of the Rio Grande, in Missouri, is sufficient to give the Missouri court jurisdiction, in rem, of that defendant.*

Section 743, R. S. Mo. 1929 (quoted in appendix), provides that any corporation, incorporated by any other state or county, and having property in Missouri, shall be liable to be sued and such property subject to attachment, as individuals, residents of other states, and having property in Missouri, are liable to be sued, and their property subject to attachment.

This court in *Davis* v. *C. C. & St. L. R. Co.*, 217 U. S. 157, held that jurisdiction can properly be obtained over the property of a non-resident railroad corporation on a transitory foreign cause of action by the attachment of the property of such defendant. In the Davis case, a resident and citizen of Illinois brought suit in Iowa against the defendant, an Ohio corporation, on a cause of action arising in Illinois. The defendant railway company was not doing business in Iowa. Jurisdiction was obtained by the attachment, and garnishment of traffic balances and other property of the defendant in Iowa. This court held that jurisdiction was thereby obtained, *in rem*, upon the de-

fendant in Iowa, as against the objection that such attachment and garnishment contravened the provisions of the interstate commerce act.

(d). *Interstate commerce is not unreasonably burdened by requiring the Rio Grande to submit to jurisdiction in this case.*

The facts, as shown by the record in this case, deny the assertion that interstate commerce would be impressed with an unreasonable burden by requiring the Rio Grande to defend the joint action in the Missouri court.

The material facts are—joint liability of the defendants—legal service of process upon both defendants—the absence of unreasonable burden on interstate commerce as to the prosecution of this suit as against the Santa Fe—the diversity of residence of the witnesses—the character of the business done by General Agent Kleine in his representative capacity for the Rio Grande—and the submission of the Rio Grande to the sovereignty of Missouri by the payment of taxes on its property permanently located and used in the state.

It would indeed seem incongruous with former decisions of this court, and with reason, to assert that interstate commerce would not be impressed with an unreasonable burden by requiring the Santa Fe to submit to the jurisdiction of the Missouri court in this case, but that it would be an unreasonable burden on interstate commerce to require the Rio Grande to sit at the same counsel table and make the same defense with the same witnesses as required of the Santa Fe.

This court has held:

> "The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process from the courts of the state. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. *The requirements of orderly, effective administration of justice are paramount*" (italics supplied).
>
> *Davis* v. *Farmers' Co-op. Equity Co.*, 262 U. S. 312, l. c. 316.

To hold that Curtis may continue his action against the Santa Fe in the Missouri court and yet be required to pursue the Rio Grande in a *separate* suit in Colorado or *Delaware*, would nullify the legal aphorism voiced in the italicized portion of the above quotation.

The case of *State of Missouri* v. *Taylor*, 266 U. S. 200, is determinative. In that case a Delaware corporation sued in Missouri a Texas railroad corporation which had no place of business in said state, and had not consented to be sued there, on three claims for damages to freight originating in Texas, one shipment of which was deliverable in Missouri where the negligence "for aught that appears" occurred in Missouri, and the other two shipments deliverable in other states where the negligence occurred. Service was obtained by garnishment of traffic balances due from connecting interstate carriers. The jurisdiction was attacked on the ground that to require the defendant to appear in the Missouri courts and defend would constitute an unreasonable burden on interstate commerce. This court, however, held:

> "* * * To require that under such circumstances, the foreign carrier shall submit to suit within a state to whose jurisdiction it would otherwise be amenable by process of attachment does not unreasonably burden interstate commerce."

It is clear that if the Missouri court had jurisdiction because of the fact that the negligence in respect to one of the shipments may have occurred in Missouri, it is equally true that the Missouri court would have jurisdiction of the instant case because of the presence of the Santa Fe in Missouri.

It is true that the plaintiff in the Taylor case, while a Delaware corporation had an office in Missouri and was considered a resident of the state, *ergo*, the Santa Fe is a resident of Missouri and this suit is being prosecuted in a state in which the Santa Fe has a residence. In this case, the inferior court has found that Curtis is a *bona fide* resident of Missouri.

It is shown, not only by the motions filed by the defendants, but by the pleadings and evidence of the plaintiff at the hearing before the state court, that the witnesses necessary in the prosecution and defense in this case do not all reside in Colorado, but also reside in Missouri, Utah and New Mexico. Can it be said that requiring the Rio Grande to take witnesses from Colorado to Missouri would constitute a greater burden on interstate commerce, either in fact or theory, than to require said defendant to bring witnesses from Utah and New Mexico into Colorado?

The Santa Fe certainly is suable in Kansas; the Rio Grande in Delaware; therefore, under the facts in this case can it be that a greater burden is placed on interstate commerce by requiring petitioners to make a joint defense in Missouri than by requiring them to make that defense in Delaware or Kansas? To hold according to petitioners' theory, as presented in the petition filed in this court, is to decide that these railroad companies are not suable in the states of their incorporation on this joint cause of action, but only

suable in the State of Colorado. This court has never expressed any such opinion, and, we undertake to say, will not usurp the functions of the legislative department of our government by the pronouncement of any such rule.

The evidence of General Agent Kleine discloses the presence of the Rio Grande in Missouri and the prosecution there of its railroad business. While it may be said that all of such business done by it in Missouri is purely interstate in character, nevertheless that fact does not render it immune from service of process in the state, as held by this court in the International Harvester case, *supra,* and other cases. It cannot be seriously contended that General Agent Kleine is a *mere soliciting agent.* He keeps the company's records of the passage of freight into Missouri; he communicates with the St. Louis office and other offices outside the state concerning the passage of freight and passengers into Missouri, originating upon his company's lines; he gives information to shippers concerning the time of arrival and other data in respect to freight shipments; he assists passengers on their arrival at the station in his territory. These acts are not isolated and disconnected with his regular duties, but according to his sworn testimony are a part of the regular business of the company, and he has been so acting in Missouri for at least five years before the institution of this suit.

Under the decisions of this court in *International Harvester Company* v. *Kentucky, supra,* and other cases, the conduct of the defendant as above epitomized certainly constitutes "doing business within the state."

The facts as outlined herein clearly distinguish this case from the cases relied upon by the petitioner, namely, *Michigan Central Railroad Co.* v. *Mix, et al.,*

278 U. S. 492, *Davis* v. *Farmers' Co-op. Equity Company,* 262 U. S. 312, and *Atchison, Topeka and Santa Fe Railway Company* v. *Wells,* 265 U. S. 101.

It clearly appears that Curtis did not move to Missouri for the mere purpose of instituting this litigation, as was inferred in the Mix case, but returned to the state of his nativity because of the helpless condition in which he was placed by the negligent acts of the defendants, and in the treatment of his case his status must be viewed as that of a *bona fide* resident of Missouri.

The attempt of petitioners to distinguish the Taylor case, *supra,* in their brief page 16, from the case at bar is impotent. This is also a proceeding *in rem* as to the Rio Grande; its property and freight balances have been attached and garnisheed and are being held subject to a final disposition of this case. The plaintiff is a resident of Missouri; while the negligence "for aught that appeared" occurred in Missouri in the Taylor case, that was true only as to one shipment; the jurisdiction of the Missouri court over the Santa Fe makes the later condition analogous.

The mere fact that a burden may be placed upon interstate commerce in requiring the petitioners to defend the action in the Missouri court does not necessarily mean, as has been repeatedly held by this court, that the burden is unreasonable.

This court should not take jurisdiction of this case on the ground that the prosecution of the action constitutes an unreasonale burden on interstate commerce, in that it controvenes Section 8, Article 1, Constitution of the United States.

II.

Jurisdiction Invoked Is Not a Violation of the Fourteenth Amendment.

In "Questions Presented" the only issue submitted by petitioners is whether the prosecution of the

action would constitute an unreasonable burden on interstate commerce. They do not there present the claim that the jurisdiction invoked is in violation of the Fourteenth Amendment, nor did they even argue this question to the Supreme Court of Missouri (see suggestions in support of writ of prohibition, R. 43 to 54 inclusive).

In the argument of that question before this court the petitioners ignore the fact that this action as to the Rio Grande is *in rem*. The inconsisteney of the position of the petitioners praying this court to decree that the writ of attachment and garnishment issued against the property of Rio Grande be declared void, and the statement on page 16 of petitioners' brief to the effect that this action is not *in rem* is too obvious for discussion. *State ex rel.* v. *Taylor, supra,* is a sufficient answer to this question.

Numerous decisions of this court cited herein, of which *State ex rel.* v. *Taylor, supra,* is one, also hold that such attachment and garnishment do not violate Sec. 1, Article XIV, Amendments to the Constitution of the United States.

The fact that the petitioners are unable to successfully distinguish the Taylor case, supra, from the case at bar is conclusively determinative on the merits of all the questions raised in this proceeding.

Conclusion.

The court is respectfully urged to refuse to take jurisdiction of this case for the reason that the decision of the Supreme Court of Missouri in refusing to grant the writ of prohibition is not out of harmony with the decisions of this court, but is in accord with the applicable decisions of this court on the questions involved.

Respectfully submitted,

CLAY C. ROGERS,
Counsel for Respondent.

APPENDIX.

Missouri Laws Relating to Foreign Corporations.

Section 742. Suits against railroads terminating opposite points in this state. All railroad corporations that own or operate roads terminating opposite to any point in this state, and which have offices or places of business in this state, shall be sued in the same manner as railroad corporations chartered by this state (R. S. Mo. 1929. For first enactment see Laws of 1858-9, p. 67, Sec. 1).

Section 743. Corporations of other states may be sued, how. Any corporation incorporated by any other state or country, and having property in this state, shall be liable to be sued, and the property of the same shall be subject to attachment in the same manner as individuals, residents of other states or countries, and having property, are now liable to be sued, and their property subject to be attached (for first enactment see R. S. 1845, p. 235, Section 22).

Section 4598. Every company incorporated for the purpose of gain under the laws of any other state, territory or country, now or hereafter doing business within this state * * * the principal officer or agent in Missouri shall make and forward to the secretary of state, with the affidavits required, a statement * * * which statement shall set out the location of its principal office or place in this state for the transaction of its business, where legal service may be obtained upon it, by serving on such agent, and also set out that if service cannot be had upon such agent on account of absence, death or inability of serving officer to find such agent, that service may be had upon the secretary of state which shall be binding upon the corporation.

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No. 130.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS.

VS.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, MISSOURI, RESPONDENT.

RESPONDENT'S BRIEF ON SUBMISSION.

CLAY C. ROGERS,
Counsel for Respondent.

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No. 130.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS.

VS.

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, MISSOURI, RESPONDENT.

RESPONDENT'S BRIEF ON SUBMISSION.

STATEMENT OF THE CASE.

Ray Curtis, an assistant signal maintainer, was injured while working for petitioners in and about the repair of an interlocking plant and signal device at Pueblo, Colorado, owned by the Atchison, Topeka and Santa Fe Railway Company. The Rio Grande is a

Delaware corporation; the Santa Fe, a Kansas corporation. This action, under the Federal Employers Liability Act (45 USCA ss. 15-59), was brought in Missouri, the state of Curtis' nativity, to which Curtis was forced to return because of his helpless and destitute condition caused by the joint negligence of both defendants, and where Curtis is a *bona fide* resident and citizen.

It is conceded that the Santa Fe owns and operates a line of railways in Missouri; is licensed to do business in Missouri; and is actually engaged in doing both interstate and intrastate business in Missouri (R. 25). Jurisdiction over the Santa Fe is asserted by service of process upon the resident general agent of the Santa Fe in charge of the office at Kansas City, Missouri, in accordance with Missouri statutes.

The Rio Grande operates no line of railways in Missouri. It maintains, however, two principal offices in Missouri for the purpose of carrying on and doing a railroad business in the state, one in St. Louis and the other in Kansas City. It is conceded that the Rio Grande solicits freight and passenger business in Missouri. The evidence further shows that the Rio Grande keeps a complete set of books and records at its offices appertaining to the movement and disposition of freight into Missouri, and that it dispenses information to local shippers concerning the whereabouts of shipments coming into the state. It pays city, county and state taxes upon property permanently located and owned by it in the State of Missouri. It pays salaries to its agents and employees in Missouri and the rent

for the three rooms occupied by it in Kansas City. These offices have been established in Kansas City for over ten years. At times distinguished persons and invalids are assisted and looked after upon their arrival in Missouri. This is done upon instructions from the Rio Grande. Kleine, general agent for the Rio Grande, further testified that "we would do that on request of a connecting line or any one, where we participated in the business in any way, which is a part of the railroad business." He further testified that he would do "anything to promulgate the business of the company" (R. 56-62).

REASONS FOR DENIAL OF WRIT.

1. The Santa Fe, having been licensed to do business in Missouri and actually engaged in doing intrastate business there, has submitted to the jurisdiction of the courts of Missouri, *Penn. Fire Ins. Co.* v. *Gold Issue M. & M. Co.*, 243 U. S. 93, has consented to suit there, *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, is suable there because of its presence in the state, *Philadelphia & R. R. Co.* v. *McKibbin*, 243 U. S. 264, on a cause of action arising in a foreign state under the Federal Employers Liability Act, 45 USCA Sec. 56, *Hoffman* v. *State of Missouri*, 274 U. S. 21, as fully as if incorporated in the state, Missouri Rev. Stat., 1929, Sec. 4689, *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, and the prosecution of such a suit there is neither lacking in due process of law, *Commercial Mutual Acc. Co.* v. *Davis*, 213 U. S. 245, nor unreasonably burden-

some on interstate commerce, *Hoffman* v. *State of Missouri, supra.*

2. The Rio Grande is doing business in Missouri within the rule announced by this court in *St. Louis Ry. Co.* v. *Alexander,* 227 U. S. 218, and jurisdiction may be asserted against it *in personam* for the same reasons and upon the same authorities applicable to the Santa Fe. Because its property in Missouri has been attached and garnisheed, it is subject to a judgment *in rem,* and the jurisdiction so asserted neither contravenes the Commerce Clause, *State of Missouri* v. *Taylor,* 266 U. S. 200, nor violates the Fourteenth Amendment, *Davis* v. *Cleveland, etc. Ry. Co.,* 217 U. S. 157.

3. The failure to comply with Rule 27, Par. 2 (e) of this court is sufficient reason for denying the writ as to the Santa Fe. (Rule 38, Par. 2)

ARGUMENT.

I.

Santa Fe's Non-compliance With Rules.

The petition for certiorari is filed on behalf of both the Santa Fe and the Rio Grande, but no errors are assigned, urged or argued by the Santa Fe. The petitioners in "Questions Presented" raise only the question of jurisdiction as to the Rio Grande. Even as to the Rio Grande, the question of jurisdiction is limited to a violation of the Commerce Clause (R. 6-8).

The revised rules of this court, Rule 38, Par. 2, provides:

> "A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be sufficient reason for denying the petition. See *United States* v. *Rimer*, 220 U. S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 392; *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508."

Rule 27 above referred to, Par. 2 (e) provides that the brief shall contain,

> "A specification of such of the assigned errors as are intended to be urged."

A failure to comply with these requirements will be sufficient reason for denying the petition. (Rule 38, Par. 2)

II.

It will be our purpose, however, not only to consider the question of jurisdiction as to the Rio Grande with reference to a violation of the Commerce Clause (which is the only question presented by the petitioners) and the Fourteenth Amendment, but also the question of jurisdiction as to the Santa Fe as affected by the Commerce Clause and the Fourteenth Amendment.

Jurisdiction As to the Santa Fe.

Under all of the decisions of this court, the Santa Fe is suable in Missouri on the transitory cause of action alleged, whether it be on the theory of submission, implied consent or presence. The Santa Fe is licensed to do business in Missouri, in compliance with Missouri Revised Statutes, 1929, Section 4598, (quoted in appendix). It owns and operates railroad trackage in Missouri. It engages not only in interstate business, but also intrastate business in Missouri. It is admitted by petitioners that the Santa Fe "while not incorporated in the state, does business therein under a license or permit" (B. 8). It has therefore submitted to the jurisdiction of Missouri courts. *Penn. Fire Ins. Co.* v. *Gold Issue M. & M. Co.*, 243 U. S. 93.

The Santa Fe is also suable in Missouri because, being licensed to do business there and having appointed a resident agent upon whom service may be had and

actually doing business in the state, it has impliedly consented to the jurisdiction, under the provisions of the Missouri Revised Statutes, 1929, Section 4689, cited in appendix, among others, which provides that a foreign railroad corporation doing business in Missouri subjects itself to "all the duties, liabilities and provisions of the laws of this state concerning railroad corporations, as fully as if incorporated in this state." *International Harvester Co.* v. *Kentucky*, 234 U. S. 579.

Missouri Revised Statutes, 1929, Sections 728, 742, 743 and other provisions of Section 4689, all quoted in the appendix also lend support to these two contentions.

The Santa Fe is also suable in Missouri under the rule of *Philadelphia & R. R. Co.* v. *McKibbin*, 243 U. S. 264, one of the cases cited by petitioners herein, because it is present in Missouri. Mr. Justice Brandeis, who delivered the opinion of this court in the McKibbin case, stating the rule, said:

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such a manner and to such an extent as to warrant the inference that it is present there."

Other cases support generally the contention that the Santa Fe is suable in Missouri on the cause of action alleged, among which are: *Baltimore & O. R. Co.* v. *Harris*, 12 Wall. 65; *New England Mutual L. Ins. Co.* v. *Woodworth*, 111 U. S. 138; *New York L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100; and *Dennick* v. *Railroad Co.*, 103 U. S. 11. The cases of *Penn. Fire Ins. Co.* v. *Gold Issue*

M. & M. Co., supra, New York, L. E. & W. R. Co. v. *Estill, supra, Commercial Mutual Acc. Co.* v. *Davis,* 213 U. S. 245, and *Hoffman* v. *State of Missouri,* 274 U. S. 21, hold that service in compliance with the Missouri Statutes—and there is no contention on the part of the petitioners that the Missouri service statutes have not been complied with—is not lacking in due process of law nor unreasonably burdens some to interstate commerce.

Nor is this case comparable to *Simon* v. *Southern Ry. Co.,* 236 U. S. 115, or *Chipman* v. *Jeffries Co.,* 251 U. S. 373, cited by petitioners. One distinction lies in the fact that the Supreme Court of Missouri has directly held that foreign railroad corporations are suable in Missouri in an action (brought under the Federal Employer's Liability Act) arising in another state (*Bright* v. *Wheelock,* 323 Mo. 840, 20 S. W. (2d) 684; *Shaw* v. *Chicago & Alton R. Co.,* 314 Mo. 123, 130, 282 S. W. 416; *Wells* v. *Davis,* 303 Mo. 388, 261 S. W. 58; *State of Missouri, ex rel. Foraker* v. *Hoffman,* 309 Mo. 625, 274 S. W. 362), and further that it is the duty of Missouri courts to take jurisdiction of such cases (*Bright* v. *Wheelock, supra*), and that said courts do not have discretion to refuse to entertain jurisdiction in such cases as held in the case of *Douglas* v. *Railroad Co.,* 279 U. S. 377.

Another distinction is pointed out by Mr. Justice Holmes in the case of *Penn. Fire Ins. Co.* v. *Gold Issue M. & M. Co., supra,* where this court commenting upon the Simon case said:

"The defendant relies upon *Old Wayne Mutual Life Ass.* v. *McDonough,* 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. 236, and *Simon* v. *Southern R. Co.,* 236 U. S. 115, 59 L. Ed. 492, 35 Sup. Ct. Rep. 25. But, the distinction between those cases and the one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik* v. *Philadelphia & R. Coal and I. Co.,* 22 Fed. 148—a statement reinforced by Cardozo, J., in *Bagdon* v. *Philadelphia & R. Coal & I. Co., supra.* In the above mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other states. *The case of service upon an agent voluntarily appointed was left untouched.* 236 U. S. 129, 130." (Italics supplied.)

No decision of this court holds that the jurisdiction asserted against the Santa Fe in this case unreasonably burdens interstate commerce. On the contrary, this court in *Hoffman* v. *State of Missouri, supra,* held that a defendant domestic railroad corporation is suable in Missouri on a foreign tort even by a non-resident. (Curtis, the plaintiff in the instant case, however, is a *bona fide* resident of Missouri.)

In the Hoffman case the cause of action, based upon the Federal Employers' Liability Act, arose in Kansas, where the employee, whose death ensued as a result of the tort resided in Kansas, and, where the administrator of his estate also resided. The action was brought in Missouri against the railroad company which was licensed to, and was doing business in

Kansas and subject to the jurisdiction of the Kansas courts. Objection was made to the prosecution of the action in the Missouri court on the ground that to require the railroad company to bring its witnesses from Kansas into Missouri to defend the case would constitute an unreasonable burden on interstate commerce. The Circuit Court of Pettis County, Missouri, refused to entertain jurisdiction of the case for that reason. Upon application for mandamus at the relation of the administrator, to compel the circuit court to take jurisdiction, the Supreme Court of Missouri (*State ex rel. Foraker* v. *Hoffman, Judge,* 309 Mo. 625), held that the action was properly maintained in Missouri. Upon a writ of error from that decision, this court held that the state court had jurisdiction of the action.

The Santa Fe is doing business in Missouri to the same extent as the defendant in the Hoffman case. For jurisdictional purposes here, we believe, there is no significant legal difference between the presence and amenability to suit in Missouri of a corporation there domesticated, and a foreign corporation licensed and actually engaged in the same identical business in the same state. Mr. Justice McKenna precisely stated the rule in *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421, as follows:

> "This court has decided too often to need citation of the cases that corporations doing business in a state and having an agent there are within the jurisdiction of the state for the purpose of suit against them, * * * and subject

to its laws, equally with corporations of the state."

In their attempt to distinguish the case of *State of Missouri* v. *Taylor*, 266 U. S. 200, from the instant case, the petitioners virtually admit, on page 16 of their brief, these contentions that the Santa Fe in this case is to be treated as a domestic corporation, by referring to the plaintiff in the Taylor case (a Delaware corporation, also maintaining a place of business in Missouri and doing business there, as follows:

> "*Second*, the plaintiff was, in a practical sense, a resident of Missouri."

From this premise, the conclusion is inescapable that the Santa Fe here is also, "in a practical sense, a resident of Missouri."

Furthermore, Congress has in the Federal Employer's Liability Act (45 USCA Sec. 56), so provided:

> "Under this chapter an action may be brought in a district court of the United States, in the district * * * in which the defendant is doing business at the time of commencing such action."

It is also provided by the Federal Employer's Liability Act that in such cases the state court shall have concurrent jurisdiction with the federal courts. (45 USCA Sec. 56). Every reason supports the conclusion that Congress in the above enactment intended that state courts shall have equal authority with that of federal courts in such cases, (*Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1), subject,

of course, to local state restrictions (*Douglas* v. *Railroad Company, supra*).

It is needless to say the defendant railroads in the cases of *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, *Davis* v. *Farmers Co-Operative Equity Co.,* 262 U. S. 312, and *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells,* 265 U. S. 101, were not doing business in the states where suit was brought.

The jurisdiction asserted against the Santa Fe, therefore, is not lacking in due process of law, does not unreasonably burden interstate commerce, since its assertion is confined to the limits set out by Congress itself, and is in conformity with the applicable decisions of this court.

III.

Jurisdiction As to the Rio Grande.

Jurisdiction of the Rio Grande is asserted: (1) *in personam,* by personal service upon the resident general agent in charge of the office of the Rio Grande in conformity with Missouri Statutes, (see appendix), and (2) *in rem,* by the attachment and garnishment of property (traffic balances) of the Rio Grande in Missouri. Preliminary to a discussion of these questions, it will be observed from an examination of the brief of the Rio Grande in support of its petition, that no distinction whatsoever is made or recognized by the Rio Grande between this two-fold assertion of jurisdiction against it in this case. That there is a crucial distinction involving different considerations between the jurisdiction asserted against the Rio Grande *in*

personam and *in rem*, is exemplified by the case of *State of Missouri* v. *Taylor*, 266 U. S. 200, where although the defendant foreign railroad corporation was not doing business in Missouri and had no office or agent there, recovery was nevertheless allowed against *property* of the defendant attached in the state on a transitory foreign cause of action against a foreign railroad corporation engaged in interstate commerce. Referring to *State of Missouri* v. *Taylor, supra*, the petitioners recognize this distinction in so many words (B. 16), as follows:

> "First, that was a proceeding *in rem* in which no personal judgment was sought, nor could such be entered. *As to such proceedings in rem different rules of law are applicable* (*Pennoyer* v. *Neff*, 95 U. S. 714)."

This question will be fully considered later.

(1) JURISDICTION *in personam* AS TO THE RIO GRANDE.

The petitioner Rio Grande predicates its contention that the jurisdiction *in personam* of the Rio Grande is offensive to constitutional provisions, evidently upon the ground that the Rio Grande is not doing business in the State of Missouri. Except for the bald assertion that the Rio Grande is not "doing business" in Missouri, no further statement is made by the Rio Grande to show that under the applicable decisions of this court, the Rio Grande is in fact *not* engaged in "doing business." Petitioner Rio Grande thus assumes without argument, not only a controverted issue in this case, but an issue which may be decisive as to jurisdiction over the Rio Grande *in per-*

sonam. If the Rio Grande is doing business in Missouri sufficient to "warrant the inference that it is present there," then the position of the Rio Grande in this law suit (so far as jurisdiction *in personam* is concerned) is identically the same as that of the Santa Fe hereinbefore considered.

RIO GRANDE DOING BUSINESS IN MISSOURI.

The Rio Grande assumes without argument that its business activities are limited to the solicitation of freight and passenger business which is admittedly insufficient under the rule announced in *Green* v. *C. B. & Q.*, 205 U. S. 530, cited by petitioners on another point, to sustain jurisdiction in that kind of a case. Unquestionably, in our opinion, the evidence without contradiction shows that the activities of the agents of the Rio Grande in Missouri are not confined to the mere solicitation of business there.

The record discloses that the Rio Grande maintains two principal offices in Missouri, one in St. Louis and the other in Kansas City; that it pays city, county and state taxes upon property permanently located and owned by it in the State of Missouri; that it pays salaries to its agents and employees in Missouri; that it pays the rent to three rooms occupied by it in Kansas City; that its offices have been established there for more than ten years; that it keeps a complete set of books and records at its offices appertaining to the movement and disposition of freight into Missouri kept by a *clerical* force; that these records are kept until the shipment is satisfactorily completed to the

local consignees; that it dispenses information to local shippers concerning the whereabouts of shipments coming into the state; that it gives local shippers or customers information concerning shipments, time of arrival and "things of that sort," which is a usual and customary part of its business; that the records of shipments made into Missouri are kept for tracing purposes; that both offices in the state communicate with each other regarding freight shipments and passengers; that distinguished persons and invalids are assisted and looked after upon their arrival in Missouri; that such assistance is given upon instructions from the Rio Grande, or, as Kleine, resident general agent for the Rio Grande, testified, "we do that on request of a connecting line or anyone, *where we participated in the business in any way;*" that this assistance given to passengers is a part of its railroad business; that its agent, Kleine, would do anything that would promulgate the business of the company (R. 56-62).

The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation "immune from the service of process under the laws of the State in which it is carrying on business." *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *Davis* v. *Farmers' Co-Op. Equity Co.*, 262 U. S. 312.

Under the facts of this case as above outlined, the Rio Grande was doing business in Missouri under the rule announced by this court in *St. Louis Ry. Co.* v. *Alexander*, 227 U. S. 218. In the Alexander case it is stated that:

"The testimony discloses that the two roads together constitute a continuous line from St. Louis, through the states of Illinois, Missouri, Tennessee, Arkansas, and Louisiana into Texas, and are together known as the 'Cotton Belt Route.' This combination has an office in the city of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol, 'Cotton Belt Route,' is found in use. Underneath appears the general description, 'St. Louis Southwestern Lines,' and there is also named a general eastern freight agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of the plaintiff's claim was taken up and considered, and correspondence concerning it was had through his office and a settlement of the claim attempted. It was only after such negotiations for a settlement had failed that this action was brought. Here, then, was an authorized agent attending to this and presumably other matters of kindred character, undertaking to act for and represent the company, negotiating for it, and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such a manner as to bring it within the district of New York, in which it was sued, and to make it subject to the service of process there."

In stating the rule upon which the above judgment was predicated, Mr. Justice Day said:

"This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference

that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process."

The instant case is stronger on the facts than the Alexander case. The doing of railroad business is the transportation of freight and passengers. An integral and important part of that business is not only the assistance or service given to passengers but also to shippers. The assistance or service given to a shipper in tracing his consignment, in locating it, is no different in character than the attempt to adjust or the payment of the claim which results in the loss of such shipment. So, likewise, the assistance of passengers, such as invalids and distinguished personages, in Missouri, is as important an act of railroad business as the sale of the ticket. Certainly, the rendition of services as above outlined cannot be denominated and defined as a mere solicitation of business. It is more than solicitation; it is one of the numerous activities of railroad corporations that comes *after* solicitation, and is, for purposes of jurisdiction here, comparable to the adjustment of claims or sale of tickets. Coupled with the facts that the Rio Grande owns property, permanently located in Missouri, upon which it pays taxes, has a *clerical* office force here, and a resident general agent, which has been the situation in Missouri for ten years, forces the conclusion that the business done by the Rio Grande is of such character and extent as to warrant the inference that it has, under the doctrine defined by this court as doing business, submitted it-

self to the jurisdiction of the courts of Missouri and is present there. Certainly it enjoys every advantage enjoyed by the Santa Fe in this case. The difference between the position of the Santa Fe and the Rio Grande on the question of "doing business" is that the Santa Fe concedes the point, while the Rio Grande assumes the contrary without argument.

The petitioner cites the case of *Green* v. *Chicago, B. & Q. R. Co., supra,* on another question, wherein this court held that "The business shown in this case was, in substance, nothing more than that of solicitation." Mr. Justice Moody, who delivered the opinion in the Green case refers to the case of *Denver & R. G. R. Co.,* v. *Roller,* 100 Fed. 738, apparently approving it, as follows:

> "In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites *Denver & R. G. R. Co.* v. *Roller,* 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 738, and *Tuchband* v. *Chicago & A. R. Co.,* 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts."

It is interesting to note that Mr. Justice McKenna, who was one of the justices of the court in the Roller case, was also one of the justices of this court at the time it rendered the opinion in the Green case. It will be further observed that the railroad corporation

against whom the jurisdiction in the Roller case was challenged is the same corporation as one of the petitioners herein, the Rio Grande. The last observation is that all of the facts in the Roller case are present in the instant case as far as jurisdiction *in personam* the Rio Grande is concerned.

One difference between the Green case and the instant case as to the Rio Grande lies in the fact that in the former case the suit was brought in a Federal Court, while in the Roller case, as in the case at bar, the action was brought in the state court. That this difference is significant is inferable from the language of this court in the Green case, as follows:

> "The facts of those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of state courts."

This court, however, in the case of *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, refers to the *Green* v. *Chicago, B. & Q. R. C., supra*, as "an extreme case."

See, also, *Reynolds* v. *Missouri, M. K. & T. R. Co.*, 233 Mass. 32, 123 N. E. 235, 224 Mass. 379, 113 N. E. 413, affirmed *per curiam* in *Missouri, M. K. & T. Ry. Co.* v. *Reynolds*, 255 U. S. 565, *Commercial Mutual Acc. Co.* v. *Davis, supra*, and *Washington-Virginia R. Co.* v. *Real Estate Trust Co.*, 238 U. S. 185.

On numerous occasions this court has said that decisions on questions of fact will not be set aside unless clearly erroneous. *New York Dock Co.*

v. *Pozman et al.*, 274 U. S. 117; *Commercial Mutual Acc. Co.* v. *Davis, supra.* In this case, the respondent is entitled to every favorable inference supporting jurisdiction that may result from the ruling of the Supreme Court of Missouri on denial of the writ of prohibition in this case and the issues of fact found by the respondent in the trial *nisi* of the issues here involved.

Other cases cited by petitioners on the question of lack of due process presupposes the absence of the fact of "doing business." The fallacy of the Rio Grande's position on the question of the validity of a possible judgment *in personam* against it, is its assumption without argument that the Rio Grande is not doing business in Missouri. The facts of this case and the decisions of this court clearly indicate in our opinion that the petitioner, Rio Grande, was doing business in Missouri sufficient to base a personal judgment against it.

If the jurisdiction against the Santa Fe is properly asserted by the Missouri court in this case, and if the Rio Grande is doing business in Missouri sufficient to warrant the inference that it has submitted to jurisdiction and is present there, it necessarily follows that jurisdiction is properly asserted against the Rio Grande *in personam.*

In the cases of *Michigan Central R. R. Co.* v. *Mix,* 278 U. S. 492, and *Davis* v. *Farmers Cooperative Equity Corporation,* 262 U. S. 312, the defendant corporations there sued were not "doing business" in the respective states where the suits were brought. That is not the situation with respect to the Rio Grande.

(2) JURISDICTION *in rem* AS TO THE RIO GRANDE.

BURDEN ON INTERSTATE COMMERCE CONSIDERED.

Of course, if this court determines that the Rio Grande is doing business in Missouri sufficient to warrant the inference that it has submitted to the jurisdiction of Missouri courts as hereinbefore contended, this fact, exclusive of others, would make reasonable any burden on interstate commerce under the rule announced in the case of *Atchison, Topeka & Santa Fe R. Co.* v. *Wells, supra,* one of the *"in rem"* cases relied on by the Rio Grande, and would dispose of this case.

But, the absence of doing business by the Rio Grande in Missouri is not sufficient in and of itself to deny to Missouri courts jurisdiction over the *property* of the Rio Grande which has been attached and garnisheed in this case. *State of Missouri* v. *Taylor, supra.*

It is our purpose now, therefore, to consider the reasonableness of the burden imposed on interstate commerce in this case as to jurisdiction *in rem* of the Rio Grande, without reference to the question of doing business. Our contention is—assuming, for purposes of argument only, that the Rio Grande is not doing business in Missouri—that the Missouri court nevertheless has jurisdiction over the property of the Rio Grande attached and garnisheed in this case.

The Rio Grande selected Delaware as the situs of its domicile; the Santa Fe, Kansas, and Curtis, Mis-

souri. Colorado is not the home of any party to the litigation, nor is it the home of all the witnesses. According to the sworn statement of the Rio Grande, some of its witnesses reside in Utah and some in New Mexico. The Circuit Court found (inferentially, at least, since plaintiff's verified motion (R. 83) raised this issue) that some of the witnesses reside in Missouri. Just where could the plaintiff bring his action against these defendants and be free from the charge that the prosecution of the same would unreasonably burden interstate commerce? Certainly, by the decision of every court in the land, he could sue the Rio Grande in Delaware, unless it should then aver that its legal existence was a mere hoax for the purpose of evading the laws of the state in which it actually owns a line of railroad, and, therefore, only a mere outlaw. In that event, it would be necessary for it to bring its witnesses four times as far to the place of trial in this case and in so doing pass them directly through the State of Missouri.

In the Hoffman case, this court said:

> "Even a foreign corporation is not immune from the ordinary processes of the courts of the state, where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidently burdened."

So, also, this court in *Davis* v. *Farmer's Co-op. Equity Co., supra,* on this subject, said:

> "The requirements of orderly, effective administration of justice is paramount."

To hold that Curtis may continue his action against the Santa Fe in Missouri and yet be required to pursue the Rio Grande in a *separate* suit in Colorado or *Delaware,* would nullify the legal aphorism voiced by this court in the above quotations.

The case of *State of Missouri* v. *Taylor,* 266 U. S. 200, is directly in point and decisive of the question of jurisdiction over the property of the Rio Grande here attached. In that case a Delaware corporation sued in Missouri a Texas railroad corporation which had no place of business in said state, and had not consented to be sued there, and was not doing business there, on three claims for damages to freight shipments originating in Texas. One of the shipments was deliverable in Missouri where the negligence "for aught that appears" occurred in Missouri. The other two shipments were deliverable in other states and the negligence giving rise to these causes of action occurred in states other than Missouri. Service was obtained by garnishment of traffic balances due from connecting interstate carriers. The jurisdiction of the court was attacked on the ground that to require the defendant to appear in Missouri courts and defend would constitute an unreasonable burden on interstate commerce. This court, however, said:

> "* * * To require that, under such circumstances, the foreign carrier shall submit to suit

within a state to whose jurisdiction it would otherwise be amenable by process of attachment does not unreasonably burden interstate commerce."

A footnote of the opinion sheds light on this particular situation, in construing the opinion as being applicable to the facts in the present case. In the Taylor case, this court said:

> "Here the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state; the shipment out of which the cause of action arose was of goods deliverable in Missouri; and, for aught that appears, the negligence complained of occurred within Missouri."

The footnote above mentioned refers directly to the statement, "the shipment of which the cause of action arose was of goods deliverable in Missouri," and is, as follows:

> "This is true only of one of the three shipments on account of which the action was brought. But if the inferior court had jurisdiction as to any one, it was obviously proper to deny the writ of prohibition."

That statement applies with great force here. If the state court here has jurisdiction to proceed against one of the joint tort feasors, the Santa Fe, it would be idle to say that proceeding against the other joint tort feasor, the Rio Grande, in the same action unreasonably burdens interstate commerce. That the liability of the Rio Grande is joint with that of the Santa Fe is not denied.

The petitioner Rio Grande asserts that all the witnesses reside in the State of Colorado. The motions

of the petitioners, their pleadings and the evidence submitted at the hearing before the respondent in the state court show that the witnesses necessary in the prosecution and defense of this case do not all reside in Colorado, but also reside in Missouri, Utah and New Mexico. Can it be said that requiring the Rio Grande to take witnesses from Colorado to Missouri would constitute a greater burden on interstate commerce, either in fact or theory, than to require said defendant to bring witnesses from Utah and New Mexico into Colorado?

In any event, the only employees of the railroads that the Rio Grande desires to use as witnesses are an assistant general manager, a chief signal maintainer, a signal foreman and a tower operator. Can it be that the absence of these four witnesses from Colorado will burden interstate commerce so unreasonably that as a matter of law this court must determine that the courts of Missouri have no jurisdiction over the property of the Rio Grande attached and garnisheed in that state in a suit by a *bona fide* resident thereof, who was forced to return to the state of his nativity—and from which he was but temporarily absent—because of his destitute and helpless condition in which he was placed by the joint negligence of both petitioners? Is it not more accurate to assert that the burden that would be placed on Curtis, by requiring him to bring his suit in Delaware, Kansas or Colorado, rather than in Missouri where it now is, would more nearly defeat the "requirements of orderly, effective administration of justice," which are paramount?

It would indeed seem incongruous with former decisions of this court and with reason, to assert that interstate commerce would not be impressed with an unreasonable burden by requiring the Santa Fe to submit to the jurisdiction of the Missouri court in this case, but that it would be an unreasonable burden on interstate commerce to require the Rio Grande to sit at the same counsel table and make the same defense with the same witnesses as required of the Santa Fe. The balance of convenience between the plaintiff going to Colorado and the Rio Grande continuing to defend in Missouri and the requirements of orderly, effective administration of justice, belie the assertion.

The Rio Grande is at liberty to take the depositions of these witnesses and offer them in evidence. It may be said that evidence by deposition is not satisfactory, but such a position is not only imaginary, but also, contrary to the law of the State of Missouri which requires a jury to give equal force, weight and effect to evidence offered by deposition as oral testimony from the witness stand. (*State* v. *Grant,* 79 Mo. 113, 137; *Elsner* v. *Supreme Lodge,* 98 Mo. 640, 11 S. W. 991, 992; *Jones* v. *St. Louis-San Francisco Ry. Co.,* 287 Mo. 64, 228 S. W. 780, 784; *Rudin Bros.* v. *Wells,* (Mo. App.) 29 S. W. (2d) 741, 742.) The plaintiff, Curtis, is entitled to whatever remedial advantages that inhere in the forum. *State of Missouri* v. *Taylor, ante.*

The fact that this action against the Rio Grande *in rem* could not be prosecuted against it in the fed-

eral courts of Missouri does not militate against the right of the plaintiff to bring his action in the Missouri state court. *State of Missouri* v. *Taylor, supra.* In the Taylor case it was contended that:

> "Original jurisdiction could not have been obtained by attachment in a federal court for Missouri, because personal service could not be made upon the Brownsville Company; and that, therefore, no court of the state could entertain a suit to enforce the claim."

Mr. Justice Brandeis, however, said:

> "The argument is unsound. Congress created the right of action. It might have provided that the right shall be enforceable only in a federal court. It might have provided that state courts shall have concurrent jurisdiction only of those cases which, by the applicable federal law, could, under the same circumstances, have been commenced in a federal court for the particular state. But Congress did neither of these things. It dealt solely with substantive law. As it made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction. The federal right is enforceable in a state court whenever its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, but is invoked in conformity with those laws."
>
> "Missouri conferred jurisdiction over claims of this nature upon the court in which the consignee sued. Under its law, this jurisdiction may be exercised, to the extent of applying property attached to the satisfaction of a claim, even though personal service cannot be made upon the defendant. That remedy is one which was not available to the consignee in the federal court of Missouri. But this fact is not of legal significance. The origin of the right does not affect the manner of

administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court. As an incident he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 221 60 L. ed. 961, 965, etc. No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right (citing cases). *But to enforce a claim by subjecting property within the state to its satisfaction, through attachment proceeding, does not enlarge the substantive right.*'

"The practice of obtaining in this way satisfaction of a claim *in personam* against an absent defendant is not one abhorrent to, or uncommon in, federal courts. In admiralty, district courts take original jurisdiction under such circumstances. *Atkins* v. *Fibre Disintegrating Co.*, 18 Wall 272, 21 L. ed. 841. At law, they do so on removal. When the case is removed, it proceeds to judgment in the Federal court, and the judgment is enforced there as against the attached property with the same effect as if the cause had remained in the state court. *Clark* v. *Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43."

The language above quoted and the reasoning is applicable to the case at bar. The plaintiff, a *bona fide* resident of Missouri, is entitled to whatever remedial advantage that inheres in the particular forum. Local laws of Missouri are appropriate to enforce the federal right, and jurisdiction in this case has been invoked in conformity with those laws. The enforcement of his claim by subjecting property within the state to its satisfaction, through attachment proceedings, as was done in the Taylor case, likewise does not enlarge his substantive right.

Particularly is this true in the case at bar, which is one under the Federal Employer's Liability Act—an act obviously intended by Congress to be for the benefit of employees engaged in interstate commerce. This act therefore "is to be construed liberally to fulfill the purposes for which it was enacted," *Jamison* v. *Encarnacion*, 281 U. S. 635, and cases there cited. It is a matter of common knowledge that railway employees are from time to time called away from their domiciliary states by reason of their employment, to reside in foreign states; that such migrations will be made from time to time; that in case of injury the employee's most natural and probable inclination is to return to the state of his original habitation. Shall an employee entitled to the benefits of the Federal Employer's Liability Act be deprived of its benefits because he was injured in a state to which he was called because of such employment in interstate commerce and because he returned to the state of his nativity—the only place where he can survive with the help of his family, from which he was but temporarily absent, and in which brings his action? Is such an interpretation a liberal construction of the Federal Employer's Liability Act? Would not such an interpretation penalize an employee for his co-operation with an interstate carrier?

DUE PROCESS OF LAW CONSIDERED.

The only case cited by petitioners involving jurisdiction over the property of the defendant foreign corporation is the case of *Atchison, T. & S. F. R. Co.* v. *Wells, ante.* This court there disposed of the question of due process of law in the following statement:

> "These facts (in the Wells case) did not render the property immune from seizure by attachment and garnishment. *Davis* v. *Cleveland, C. C. & St. Louis Ry. Co.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907."

In *Davis* v. *Cleveland, etc., Ry. Co.*, 217 U. S. 157, a resident and citizen of Illinois brought suit in Iowa against the defendant, an Ohio corporation, on a cause of action arising in Illinois. The defendant railway company was not doing business in Iowa. Jurisdiction was obtained by the attachment and garnishment of traffic balances and other property of the defendant in Iowa. This court held that jurisdiction was thereby obtained, *in rem*, upon the defendant's property in Iowa.

PETITIONER'S AUTHORITIES DISTINGUISHED.

The only case cited by the Rio Grande involving an interpretation of the Federal Employer's Liability Act is the case of *Michigan Central* v. *Mix*, 278 U. S. 492. In the Mix case, the action was brought by the widow, who removed to St. Louis, Missouri, for the sole purpose apparently of instituting the suit. Referring to that fact, this court said:

> "For aught that appears, her removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit, and because she was advised that her chances of recovery would be better than they would be in Michigan."

The affidavit filed on behalf of the plaintiff, Curtis, shows that:

> "Plaintiff, Ray Curtis, is and has been during his entire lifetime an actual and *bona fide* resident of the State of Missouri, except for a period of temporary absence while working for the defendants in the State of Colorado; that plaintiff now resides in Trenton, Grundy County, Missouri, in which said county he was born and raised and where his family and parents do now and have for many years resided."

And it further appears from the affidavit that Curtis returned to his home state because he is dependent upon his relatives for support. To require him to bring his suit in Colorado or Delaware would cast an unreasonable burden upon him, not contemplated by the Federal Employer's Liability Act, but contrary thereto. The decision of the respondent sustaining jurisdiction creates an inference that the return of Curtis to Missouri was not for the purpose of instituting suit, but because of his physical condition, over which he had no control, and the necessity of relying upon his family for support. The evidence supports this contention.

Furthermore, the Michigan Central Railroad Company was a Michigan corporation and a citizen and resident of the State of Michigan. In this case, the Rio Grande is not a Colorado corporation and is not a citizen of that state. In a *removable* suit in that state it would disclaim its Colorado residence, cling to its Delaware citizenship, and remove the case to the federal courts to thus deny the operative effect of the laws of Colorado.

Furthermore, there was no showing in the Mix case that witnesses resided in any place or state other than the State of Michigan, whereas, in this case, it is admitted by the railroad companies that witnesses reside in states other than Colorado, and it is proven beyond dispute that witnesses reside in the State of Missouri. A further distinction between the two cases is that in this case, the Santa Fe, a joint tort feasor, is properly suable in the courts of this state, whereas, the Michigan Central was alone responsible in the Mix case. Also, while it appears that the action was one under the Federal Employer's Liability Act, yet it does not appear that the attention of the court was directed to the difference between a case under a local state law, which should be interpreted by the courts of that state and a federal act applying the same in all of the states. See extracts from opinions in *State of Missouri* v. *Taylor, supra,* and *Green* v. *Chicago, B. & Q. R. Co., supra,* quoted in this brief.

In the case of *Davis* v. *Farmers' Co-Op. Equity Co.*, 262 U. S. 312, like the Mix case, there was only one alleged tort feasor. There was also not the slightest showing that any witnesses resided in the State of Minnesota, or that there was any reason whatever for going to that state and bringing the action. The defendant railroad corporation in the Davis case also was not engaged in doing business in the State of Minnesota sufficient to warrant the inference that it was present there. In the Davis case no question of jurisdiction over property of the defendant was involved, nor was it a case involving the Federal Employer's Lia-

bility Act. An extract from the Davis case quoted by petitioners (B. 14) inferentially supports the jurisdiction here asserted. It is there said:

> "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to suit in a state in which the cause of action did not arise in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, *and in which the plaintiff does not reside.*"

In the case at bar, Curtis, is a *bona fide* resident of the State of Missouri.

The distinguishing features of the case of *Atchison, T. & S. F. Ry. Co.*, v. *Wells*, 265 U. S. 101, from the case at bar are: the plaintiff in the Wells case was not a resident of the state where suit was brought; it does not appear that any witnesses resided in Texas; nor that any corporation properly suable in Texas, was jointly liable with the Santa Fe; nor that the action was under the Federal Employer's Liability Act.

The attempt of petitioners to distinguish the Taylor case, *supra*, in their brief page 16, from the case at bar, to which we refer in the order set out in petitioners' brief, is impotent:

First, This is also a proceeding *in rem* as to the Rio Grande; its property and freight balances have been attached and garnisheed and are being held subject to a final disposition of this case.

Second, The plaintiff in the case at bar is a resident of Missouri.

Third, While the negligence "for aught that appears" occurred in Missouri in the Taylor case, Mr. Justice Brandeis, in the footnote to that case said: "This is true only of one of the three shipments on account of which the action was brought. But if the inferior court had jurisdiction as to any one, it was obviously proper to deny the writ of prohibition."

Fourth, While one shipment was destined to Missouri, the other two shipments were not.

Fifth, The jurisdiction of the Missouri court over the Santa Fe in the case at bar makes the later condition analogous, that is, as Mr. Justice Brandeis said, "if the inferior court had jurisdiction as to any one, it was obviously proper to deny the writ of prohibition."

Referring to the case of *Davis* v. *Farmers' Co-Op. Equity Co., supra,* and the case of *Atchison, T. & S. F. Ry. Co.* v. *Wells, supra,* this court in the Taylor case said:

> "The facts of this case differ vitally from those involved there."

The fact that the petitioners are unable to successfully distinguish the Taylor case, *supra,* from the case at bar is determinative of this controversy.

Conclusion.

For the foregoing reasons it is respectfully urged that judgment be entered denying the writ of certiorari and that the judgment of the Supreme Court of Missouri be affirmed.

Respectfully submitted,

CLAY C. ROGERS,
Counsel for Respondent.

APPENDIX.

Missouri Laws Relating to Foreign Corporations.*

Section 728. Writs, how served on foreign corporations. Fourth, where the defendant is a corporation * * * organized under the laws of any other state or country, and having an office and doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business * * * and when had in conformity with this subdivision, shall be deemed personal service against such corporation and authorize the rendition of a general judgment against it (R. S. of Mo. 1929).

Section 742. Suits against railroads terminating opposite points in this state. All railroad corporations that own or operate roads terminating opposite to any point in this state, and which have offices or places of business in this state, shall be sued in the same manner as railroad corporations chartered by this state.

Section 743. Corporations of other states may be sued, how. Any corporation incorporated by any other state or country, and having property in this state, shall be liable to be sued, and the property of the same subject to attachment, in the same manner as individuals, residents of other states or countries, and having property, are now liable to be sued, and their property subject to be attached.

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*Revised Statutes of Missouri, 1929 (see next page).

Section 743. Corporations of other states may be sued, how. Any corporation incorporated by any other state or country * * * shall be liable to be sued * * * in the same manner as individuals, residents of other states or countries * * * are now liable to be sued. * * *

Section 4689. * * * or any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations, as fully as if incorporated in this state * * * and a corporation of another state, being a lessee of a railroad in this state, or running its engines and cars upon a railroad in this state under a license, permit or running arrangement, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued in all cases and for the same causes and in the same manner as a corporation of this state might sue or be sued if operating its own road. * * *

Section 4598. Every company incorporated for the purpose of gain under the laws of any other state, territory or country, now or hereafter doing business within this state * * * the principal officer or agent in Missouri shall make and forward to the secretary of state, with the affidavits required a statement * * * which statement shall set out the location of its principal office or place in this state for the transaction of business, where legal service may be obtained upon it, by serving such agent. * * *

SUPREME COURT OF THE UNITED STATES.

No. 130.—October Term, 1931.

Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, Petitioners, *vs.* Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City.	On Writ of Certiorari to the Supreme Court of the State of Missouri.

[January 4, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

This writ of certiorari to the Supreme Court of Missouri brings up for review a judgment which denied a petition for prohibition without an accompanying opinion.

Following the local practice, the Denver and Rio Grande Western Railroad Company (Rio Grande) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) presented their petition directly to the Supreme Court. After setting out the proceedings in an action against them pending in the Jackson County Circuit Court, it alleged that if the cause proceeded to trial an undue burden on interstate commerce would result; also the commerce clause of the Federal Constitution and the Fourteenth Amendment would be violated. It asked that the presiding Judge be restrained from entertaining further jurisdiction.

On August 26, 1930, Curtis, then residing in Missouri, brought the above mentioned action against both the Santa Fe and the Rio Grande under the Federal Employers' Liability Act. He sought damages for personal injuries said to have resulted from their joint negligence on December 26, 1929, while he was employed by them at an interlocking track and signal plant near Pueblo, Colorado.

A writ of attachment against the Rio Grande was served by garnishee process upon several railroad companies said to be indebted to it. Summonses for both defendants were served upon their agents.

Defendants, appearing specially, moved to quash the attachment and summonses and presented affidavits to support their motions. The plaintiff filed counter-affidavits. It appeared that properly to defend the cause would require attendance of witnesses from Colorado at large expense; also the attendance of some witnesses for the plaintiff who resided in Missouri. The trial court overruled the motions. Thereupon, the defendants petitioned the Supreme Court as above stated.

The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado, Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic. It is not licensed to do business in Missouri.

The Santa Fe, a Kansas corporation, owns and operates railroad lines in Missouri, Kansas, Colorado, and other States. It is licensed to do business in Missouri and has an office and agents in Jackson County. These agents transact the business ordinarily connected with the operation of a carrier by railroad.

After being injured at Pueblo, and before instituting his action against the railroad companies, Curtis removed to and became a bona fide resident and citizen of Missouri.

According to the doctrine approved in *Hoffman* v. *Foraker*, 274 U. S. 21, we think the Santa Fe was properly sued in Jackson County. The Supreme Court committed no error of which we can take notice by refusing to prohibit further prosecution of the action against that company. The mere fact that the Santa Fe was named a codefendant with the Rio Grande was not enough to defeat jurisdiction of the court over the former.

Under the rule approved in *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492, the Rio Grande properly claimed exemption from suit in Jackson County. It was not necessary to join the two Railroad Companies in one action. Whatever liability exists is several. The prohibition against burdening interstate commerce

cannot be avoided by the simple device of a joint action. Nor can this be evaded merely by attaching the property of the non-resident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the court.

The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this. *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312. Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain or refuse jurisdiction according to the relative inconvenience of the parties.

The judgment of the Supreme Court must be reversed. The cause will be remanded there for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.